TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ~~902~~ ~~702~~ 130

POSTAL TELEGRAPH-CABLE COMPANY, PLAINITIFF IN ERROR,

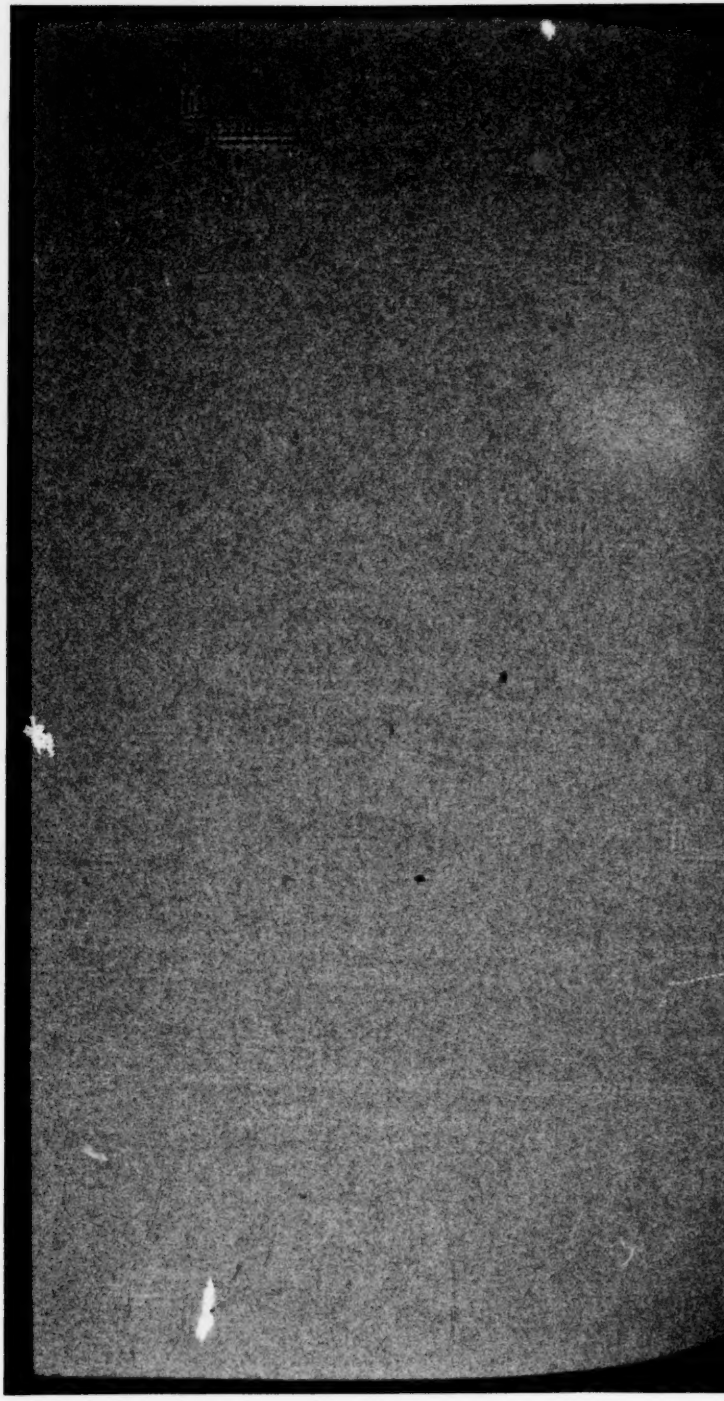
vs.

TONOPAH AND TIDEWATER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT OF THE STATE OF NEW YORK.

FILED FEBRUARY 8, 1917.

(25,761)



(25,761)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 931.

POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

TONOPAH AND TIDEWATER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print
Case on appeal to Court of Appeals	1	1
Statement under rule 41 on appeal to appellate division	1	1
Notice of appeal to appellate division	2	2
Statement under rule 41 on appeal to appellate term	3	3
Notice of appeal to appellate term	4	4
Summons	5	5
Complaint	6	6
Answer	8	8
Exhibit A—Agreement of June 26, 1907, attached to answer	10	10
Judgment	25	25
Testimony of Charles Patterson Bruch	26	26
Colloquy between court and counsel	37	37
Synopsis of exhibits	38	38
Opinion, Lynn, J.	40	40
Stipulation as to exhibits	41	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. FEBRUARY 20, 1917.

	Original.	Print
Stipulation settling case	41	41
Order of affirmance	42	42
Judgment of affirmance	43	43
Affidavit of no opinion	44	44
Stipulation as to exhibits	45	45
Stipulation waiving certification	46	46
Judgment	47	47
Petition for writ of error	48	48
Assignment of errors	52	50
Order allowing writ of error	56	52
Writ of error	58	52
Citation and service	61	53
Bond on writ of error	63	54
Affidavit of no opinion	66	57
Clerk's certificate	67	58
Plaintiff's Exhibit 1—Ruling of Interstate Commerce Commission, March 28, 1916	68	58
2—Ruling of Interstate Commerce Commission, December 21, 1906	69	59
3—Ruling of Interstate Commerce Commission, June 3, 1907	75	62
4—Ruling of Interstate Commerce Commission, June 30, 1908	77	63
5—Judgment-roll in case of Humbird *vs.* Chicago Great Western Ry. Co. &c.	78	63
Order appointing special master	80	64
Order of authority to special master, &c.	81	64
Intervening petition	84	66
Exhibit A—Agreement between Chicago, St. Paul & Kansas City Ry. Co. and Postal Telegraph-Cable Co., December 26, 1888	94	72
Agreement with C. G. W. Ry. Co., February 5, 1902	101	76
Exhibit B—Agreement between Mason City & Fort Dodge Ry. Co. and Postal Telegraph-Cable Co., December 26, 1903	102	77
Demurrer	109	82
Notice of special master	113	83
Report of special master	114	84
Objections to master's report	117	85
Order as to exceptions, &c.	119	86
Judgment	120	87
Clerk's certificate	121	87

	Original.	Print
Plaintiff's Exhibit 6—Proceedings in U. S. District Court, District of Maryland, in case of Western Union Telegraph Co. *vs.* Baltimore & Ohio R. R. Co.	124	88
Docket entries	124	88
Bill of complaint	127	89
Exhibit A—Agreement between Western Union Telegraph Co. and B. & O. R. R. Co., October 15, 1887	142	99
Schedule A	157	108
Answer	159	110
Decree	168	114
Clerk's certificate	168	115
7—Certificate of Postmaster General showing plaintiff's acceptance of terms of post-road act of 1866, &c.	171	115
8—Section 9 of act of English Parliament of July 31, 1868, &c.	178	117
9—Portion of testimony of Sir Robert Hunter of July 25, 1911, &c.	189	120
10—Portion of testimony of Sir Henry Norman, &c.	247	122
11—Extracts from pages 410 and 411 of vol. 31 of Interstate Commerce Reports	250	122
12—Tabulation by Mr. Bruch, based upon reports of British Postmaster General	253	124
Stipulation as to Defendant's Exhibit A, &c.	254	124

New York Supreme Court

Appellate Division — First Department.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-respondent.

Statement Under Rule 41 on Appeal to Appellate Division.

This action was commenced in the Municipal Court of the City of New York, Borough of Manhattan, First Department, by the service of a summons and complaint on the defendant on June 7th, 1916. Notice of appearance on behalf of the defendant was served on June 12th, 1916. Answer was served and issue joined on June 13th, 1916. The names of the parties appear in full above and there has been no change in the parties or attorneys since the commencement of the suit.

The Appellate Term affirmed the judgment of the Municipal Court and in the order of affirmance granted leave to the appellant to appeal to the Appellate Division.

Notice of Appeal to Appellate Division.

NEW YORK SUPREME COURT.

APPELLATE TERM—FIRST JUDICIAL DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff-appellant,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant-respondent.

TAKE NOTICE that the above-named plaintiff hereby appeals to the Appellate Division of the Supreme Court for the First Department, pursuant to the permission granted by the Appellate Term, from the judgment of affirmance entered herein in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, on the 2d day of November, 1916, and from the order of affirmance of the Appellate Term of said Supreme Court entered herein in the office of the Clerk of the County of New York, on the 2nd day of November, 1916, and the said plaintiff appeals from each and every part of said judgment and order as well as from the whole thereof.

Dated, November 8th, 1916.

Yours, etc.,
WILLIAM W. COOK,
Attorney for Plaintiff-Appellant,
44 Wall Street, New York City.

To

The Clerk of the County of New York, and

The Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and

Steele, DeFriese & Steele, Esqs.,
Attorneys for defendant-respondent.

NEW YORK SUPREME COURT.

APPELLATE TERM—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-respondent.

Statement under Rule 41 on Appeal to Appellate Term.

This appeal is taken from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District. The judgment appealed from was entered in the office of the Clerk of the said Court on June 30th, 1916. The action was commenced on the 7th day of June, 1916, by the service of a summons and verified complaint. Notice of appearance on behalf of the defendant was served on June 12th, 1916. On June 13th verified answer was served. The names of the original parties in full are as follows: Postal Telegraph-Cable Company, plaintiff; Tonopah and Tidewater Railroad Company, defendant. There have been no changes in the parties since the commencement of the suit. The names of the attorneys appearing for the respective parties in the appeal are, for the appellant, William W. Cook, 44 Wall Street, New York City, New York. For the respondent, Steele, deFriese & Steele, 32 Nassau Street. Notice of appeal was served on July 1st, 1916.

Notice of Appeal to Appellate Term.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff-appellant,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant-respondent.

File No. 14033—16

TAKE NOTICE that the above-named plaintiff hereby appeals to the Supreme Court of the State of New York, Appellate Term, First Department, from the judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, entered herein in the office of the Clerk of said Court at 146 Grand Street, Borough of Manhattan, New York City, New York, on or about the 30th day of June, 1916, whereby judgment for the defendant was rendered herein, and the said plaintiff appeals from each and every part of said judgment as well as from the whole thereof.

Dated, July 1st, 1916.

Yours, etc.,

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant,
44 Wall Street, New York City.

To

Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and

Messrs. Steele, deFriese & Steele,
Attorneys for Defendant-Respondent.

Summons.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,* *against* TONOPAH AND TIDEWATER RAILROAD COMPANY, *Defendant.*	SUMMONS.

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to appear in this action in the Municipal Court of the City of New York, Borough of Manhattan, First District, before the Clerk of the said Court at his office at 146 Grand Street, in the Borough of Manhattan, in the City of New York, within five days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; and if you fail to make answer, judgment will be taken against you for the sum of $7.32.

Dated, New York City, the 7th day of June, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff,
(Office and Post Office Address)
44 Wall Street,
New York City.

Plaintiff's address, 253 Broadway, New York City.

Complaint.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant.

The above-named plaintiff for a complaint against the above-named defendant alleges as follows:

I. That during all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized under and in accordance with the laws of the State of New York for the purpose of transacting the business of transmitting and delivering telegraphic messages in the city and State of New York, and into and through other states of the United States.

II. That during the time hereinafter mentioned the defendant was and still is a corporation duly organized under and in accordance with the laws of the State of New Jersey for the purpose of owning and operating railroads and carrying on the railroad business in said state and in other states of the United States.

III. That during the month of April, 1916, the plaintiff transmitted for the defendant, at the request of the defendant, divers and sundry interstate messages to New York City and elsewhere. That during the said month of April, 1916, plaintiff, at the request of defendant, rendered services for the defendant in transmitting interstate

telegraph messages to New York City and elsewhere.

IV. That the said services and delivery and transmission of said messages are reasonably worth the sum of Seven and 32-100 dollars ($7.32).

V. That no part of the said sum of Seven and 32-100 dollars ($7.32) has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Seven and 32-100 dollars ($7.32).

WILLIAM W. COOK,
Attorney for Plaintiff,
44 Wall Street, New York City, N. Y.

STATE OF NEW YORK,
County of New York. } ss.:

EDWARD C. PLATT, being duly sworn, deposes and says that he is the Treasurer of the Postal Telegraph-Cable Company, the plaintiff above named, which company is a corporation created under the laws of the State of New York, and that the foregoing complaint is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the plaintiff is that the plaintiff is such corporation; that this deponent is an officer of the same, to wit, its Treasurer, and is acquainted with the facts.

EDWARD C. PLATT.

Sworn to before me this
7th day of June, 1916.

ROBERT J. HALL,
Notary Public,
Kings County, No. 65.
Certificate filed in N. Y. Co., No. 136.

Answer.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff,
vs.
'ONOPAH AND TIDEWATER RAILROAD ROAD COMPANY,
Defendant.

The defendant above named, by Steele, deFriese & Steele, its attorneys, answering the complaint of the plaintiff herein, alleges as follows:

1. The defendant admits each and all of the allegations set forth in paragraphs 1, 2, 3, 4 and 5, of the complaint herein.

FOR A DEFENSE TO THE ALLEGED CAUSE OF ACTION IN SAID COMPLAINT SET FORTH, DEFENDANT ALLEGES AS FOLLOWS:

2. On or about the 26th day of June, 1907, the plaintiff herein and the defendant herein entered into a contract in writing, a true copy of which is hereunto annexed, marked "Exhibit A" for identification, and made in all things a part hereof; wherein and whereby it was covenanted and agreed among other things as appears in paragraphs "Ninth", "Tenth" and "Eleventh" of said contract that the plaintiff should transmit telegrams and messages relative to the business of the defendant at the defendant's request, without compensation, over the lines of the plaintiff company within the United States, to an amount calculated at the regular day rates of the plaintiff

company not exceeding $12.00 per annum for each and every mile of railroad up to two hundred miles on which telegraph wires are operated under said agreement and not exceeding $10 per annum for each and every mile of railroad over two hundred miles on which telegraph wires are operated under the said agreement. In consideration of said free service to be rendered by the plaintiff to the defendant, the defendant should furnish free transportation to officers, employees, laborers, etc., of the plaintiff company when travelling on the business in connection with the construction, maintenance or operation of the plaintiff's lines; such transportation to be furnished without compensation to defendant further than the benefits to the defendant of said contract, but not to exceed in any year the amount of telegraph service that the plaintiff agrees to perform for said defendant.

3. The services rendered for which the plaintiff herein is now suing consist of the transmission of telegrams relative to the business of the defendant herein, and the same were not in excess of the amount of services to be rendered without compensation to the plaintiff, as per contract heretofore referred to.

4. The defendant has duly performed each and all of the conditions on its part to be performed as required by contract heretofore referred to.

WHEREFORE, the defendant demands that the complaint herein be dismissed with the costs and disbursements of this action.

STEELE, DEFRIESE & STEELE,
Attorneys for defendant,
Office and P. O. Address,
32 Liberty Street,
New York, N. Y.

Answer.

STATE OF NEW YORK,
County of New York. } ss.:

CHRISTIAN B. ZABRISKIE, being duly sworn, deposes and says that he is Secretary and Treasurer of the Tonopah and Tidewater Railroad Company, the defendant herein, which company is a corporation created under the laws of the State of New Jersey, and that the foregoing answer is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that the defendant is such corporation; that this deponent is an officer of the same, to wit, the Secretary and Treasurer, and is acquainted with the facts.

CHRISTIAN B. ZABRISKIE.

Sworn to before me this
13th day of June, 1916.

Frank Walher,
Notary Public, Kings Co.
Reg. No. 8009.
New York Co. Reg. No. 8145.
Commission expires March 30, 1918.

Exhibit A attached to Answer.

THIS AGREEMENT, made and entered into this 26th day of June, 1907, by and between the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York, and the Tonopah and Tidewater Railroad Company, a corporation duly organized and existing under the laws of the State of New Jersey, hereinafter for convenience re-

ferred to as the Telegraph Company and the Railroad Company, respectively,

WITNESSETH;

WHEREAS, the Telegraph Company and its allied companies operate a system of telegraph throughout the United States; and

WHEREAS, the Railroad Company is constructing or about to construct a line of railroad with a telegraph line thereon between Ludlow, San Bernardino County, California, and Beatty and Rhyolite, Nye County, Nevada; (a distance of not over 200 miles) via Crucero, California; Dumont and Zabriskie, California, with branches approximating 45 miles; (the route of said line of railroad being shown on the diagram hereto attached and made a part hereof) and desires to operate the said telegraph line and future additions to and extensions thereof in connection with the system of the Telegraph Company for the purpose of an interchange of commercial telegraph business.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter specified to be performed and observed by each of them and for other valuable considerations moving from each of said parties to the other, receipt of which is hereby acknowledged by each of the parties hereto, the parties hereto agree with each other as follows:

FIRST: (1) It is mutually agreed that commercial telegraph business between points on the lines of said Railroad Company and points on the lines and connections of the Telegraph Company shall be interchanged exclusively between the parties hereto except that telegraphic business of the Telegraph Company to points where both

companies have offices is not included in this contract. Each of the parties hereto agrees that it will turn over to the other at Ludlow, California, or at such other connecting points as shall best secure prompt transmission to destination, all commercial telegraph business which it may be able to obtain or control directed to points on the lines or connections of the other party (including all cablegrams and all commercial telegraph business which shall come to it from any other telegraph company).

(2): Additional points of connection may be established by mutual consent from time to time as the business of the parties hereto may require.

SECOND: (1) All tolls and revenue on messages handled exclusively by and between the officers of the Railroad Company along its line of railroad shall belong to the Railroad Company.

(2): After deducting from the total tolls on all interchanged telegraph messages originating at or directed to points on the lines of the Railroad Company the total amounts which the Telegraph Company may pay or account for to other connecting lines, the balance of said total tolls shall be divided between the parties hereto, seventy-five (75) per cent. to the Telegraph Company and twenty-five (25) per cent. to the Railroad Company.

(3): The Telegraph Company shall determine all questions of tariff and shall fix all rates for commercial telegraph business to and from the offices on the lines of the Railroad Company, and the tariff rates of the Telegraph Company, now or hereafter in force, shall apply to said business; and said business shall be accounted for and handled at said offices in accordance with the rules, regulations, instructions and tariff rates as

published from time to time in the tariff books, circulars and notices of the Telegraph Company.

(4): Each party hereto agrees to make to the other party hereto, in the form and manner required by the Auditor of the Telegraph Company, a monthly statement, showing all commercial telegraph business interchanged under this agreement between their respective offices and the balance due and payable thereon. Said statement shall be rendered not later than the 20th day of the month following, and each party hereto agrees to pay, within sixty (60) days after receipt of such statement, any balances shown therein that are properly due and payable.

THIRD: (1) Each party hereto hereby summons all liability for damages resulting from mistakes or delays, or for non-delivery or other defaults in the transmission of commercial telegraph business under this agreement that may occur at its own offices or upon its own lines or that may be occasioned by the fault of its own employees, and in case such default cannot be located it is mutually agreed that any damages or liabilities resulting therefrom shall be divided and borne by the parties hereto in the same proportion as the tolls were divided upon the message from defaults in the transmission of which such damages or liabilities may have arisen.

(2): Neither party hereto shall be liable to the other for loss or damage resulting from interruption to lines, which could not with reasonable care and promptness have been avoided or repaired.

FOURTH: (1) The Telegraph Company hereby agrees to advertise the offices of the Railroad Company as a part of its general system and to furnish, and deliver at the most convenient terminus of the Railroad Company, office signs,

message blanks and other forms necessary for the proper conduct of the commercial telegraph business at said offices, and the Railroad Company hereby agrees that such signs, blanks and forms shall be used at all of its offices, the purpose being to identify the commercial telegraph business done at said offices with the Telegraph Company's system.

(2): The Telegraph Company agrees to furnish to the Railroad Company without charge to the Railroad Company a sufficient number of eight foot cross arms (with pins, insulators, braces and bolts necessary therefor) to equip the Railroad Company's poles (one crossarm to each pole) between Ludlow and Beatty, a distance of not to exceed two hundred (200) miles, it being further understood that the existing or standing poles of the Railroad Company shall be used. Said poles and cross-arms shall be erected at the Railroad Company's own cost and expense and shall be the property of the Railroad Company, subject, however, to the rights of the Telegraph Company as hereinafter provided.

FIFTH: The Telegraph Company agrees to give to the Railroad Company the use of the Telegraph Company's main batteries now or hereafter established at connecting points for the operation of the Railroad Company's wires on which commercial telegraph business is handled under this agreement, without charge to the Railroad Company therefor; it being distinctly understood and agreed however, that the Telegraph Company shall not be required to provide or maintain any main batteries at any point solely for the use of the Railroad Company.

SIXTH: (1) The Railroad Company hereby agrees to maintain its railroad telegraph lines herein mentioned in good working order and re-

pair, at its own cost and expense, and to repair with the utmost diligence any interruptions to said lines.

(2): The Railroad Company agrees that each of its stations where a telegraph office shall be maintained, the Railroad Company shall keep in its employ a sufficient number of competent operators and messengers to handle the commercial telegraph business to and from said station, in the most careful, efficient and expeditious manner. Said operators and messengers shall be paid by the Railroad Company, but shall be satisfactory to the Telegraph Company so far as the handling of commercial telegraph business is concerned, and any of said employees who may not be satisfactory to the Telegraph Company in that respect shall be removed from service so far as the handling of commercial telegraph business is concerned upon written request so to do from the general superintendent of the Telegraph Company.

SEVENTH: (1) The Railroad Company agrees to furnish in its office at Ludlow, California, the operators necessary for the proper transmission and receipt upon the wires of the Telegraph Company of the interchanged commercial telegraph messages herein provided for. It is mutually agreed that the wires of the Railroad Company may be connected at Ludlow to such wires of the Telegraph Company as the latter company may designate so as to form a direct circuit or circuits between offices on the lines of the Railroad Company and offices on the lines of the Telegraph Company at such times and in such manner as may be mutually agreed upon, it being understood and agreed that all business handled on said direct circuits between railroad offices and the offices of the Telegraph Company shall

be considered as having been interchanged under this agreement at Ludlow.

(2): The Telegraph Company agrees to furnish at its main offices at additional points of connection hereafter established by mutual consent from time to time as hereinabove provided, the operators necessary in said main offices for the proper transmission to and receipt from the Railroad Company's wires between said main offices and the offices of the Railroad Company of the interchanged commercial telegraph messages herein provided for, and it is mutually agreed that at said additional points of connection the wires of the Railroad Company may be connected to such wires of the Telegraph Company as the latter company may designate so as to form a direct circuit or circuits between offices of the Railroad Company and offices of the Telegraph Company, at such times and in such manner as may be mutually agreed upon, it being understood and agreed that all business handled on said direct circuits between offices of the Railroad Company and officers of the Telegraph Company shall be considered as having been interchanged under this agreement at the points where said wires are physically connected.

EIGHTH: (1) It is understood and agreed that the Telegraph Company may if it so elect establish and maintain at its own cost and expense, independently of the Railroad Company, and operate by means of the Telegraph Company's own wires strung upon the Railroad Company's poles as hereinafter provided, offices apart from the railroad stations in any of the cities and town upon the lines of said railway and extensions thereof (with such changes in location as may be deemed best from time to time) when the paid commercial messages to and from any of the said cities or town amount to twelve hundred (1200)

messages per month for three (3) consecutive months, and the Railroad Company shall not be entitled to any part of the tolls upon messages handled at said independent offices of the Telegraph Company, except (on messages actually handled at one end by the Railroad Company's offices) the twenty-five per cent. (25%) hereinbefore specified of balance of tolls. And it is further understood and agreed that in said cities where the Telegraph Company may so establish independent offices, the Railroad Company shall have the right to maintain in its stations and ticket offices telegraph offices for the receipt from the public, but not for the delivery of commercial telegraph business, all commercial telegraph business taken in at any of the offices of the Railroad Company directed to said cities shall be turned over to the Telegraph Company for delivery. It is understood and agreed that the tolls on commercial telegraph business collected by the Railroad Company at its offices in said cities shall be divided in the manner specified in paragraph Second of this agreement.

(2): It is understood and agreed that if the paid commercial messages to and from any railroad telegraph office shall average twelve hundred (1200) messages per month for three consecutive months, the Railroad Company may, if it so elect, call upon the Telegraph Company to establish and maintain an office by means of its own wires apart from the railroad station, at the Telegraph Company's own cost and expense and in that event the Telegraph Company shall so establish and maintain such independent offices.

NINTH: (1) All telegrams pertaining to the business of the Railroad Company between points on the lines of the Railroad Company shall be transmitted by the Railroad Company's own employees on its own telegraph lines.

Answer.

(2): The Telegraph Company agrees to issue cards or books of stamps to such officers and employees of the Railroad Company as may be designated by the proper officers of said company, authorizing the transmission of telegrams relative to the business of the Railroad Company over the lines of the Telegraph Company within the United States to an amount, calculated at the regular day rates of the Telegraph Company not exceeding twelve dollars ($12) per annum for each and every mile of railroad up to two hundred (200) miles on which telegraph wires are operated under this agreement; and not exceeding ten dollars ($10) per annum for each and every mile of railroad over two hundred (200) miles on which telegraph wires are operated under this agreement. The tolls on all such telegrams shall be computed at the regular day rates of the Telegraph Company between the points of origin and destination of such telegrams and the Railroad Company agrees to pay to the Telegraph Company the latter's regular commercial day rates on all such messages in excess of the amount of service above specified, settlement to be made annually.

(3): It is understood and agreed that the service herein provided for applies only to the transmission of messages concerning only the operation and business of the Railroad Company, and moreover, shall not in any case be extended to messages for transmission by ocean cables or by other telegraph companies.

(4): Cards or stamps issued by the Telegraph Company authorizing the transmission of telegrams, when presented at commercial telegraph offices of the Railroad Company, shall be honored and telegrams offered thereunder shall be accepted and transmitted to and from said offices, and no

charge therefor shall be made by the Railroad Company against the Telegraph Company.

(5): The Railroad Company and its employees shall not, without the consent of the Telegraph Company, transmit any messages between points on the Railroad Company's lines and points on the Telegraph Company's lines except those provided for in this agreement.

TENTH: (1) The Railroad Company agrees to issue to such officers and employees of the Telegraph Company as may be designated by the executive officers of the Telegraph Company annual and trip passes or tickets authorizing the free transportation over the lines of the Railroad Company of said officers, employees and laborers of the Telegraph Company when travelling on business in connection with the construction, maintenance or operation of the telegraph line and service upon the Railroad Company's own right of way herein specified and provided for; and further agrees to transport over its lines free of charge to the Telegraph Company all such material and supplies as are required in connection with the construction, maintenance or operation of the telegraph lines and service upon the Railroad Company's own right of way herein specified and provided for.

(2) Said transportation (to be furnished without compensation to the Railroad Company other than the benefits to the Railroad Company of this contract) shall not exceed in any year the amount of telegraph service that the Telegraph Company herein agrees to perform for the Railroad Company and the Telegraph Company hereby agrees to pay to the Railroad Company its regular current transportation rates for such transportation in excess of said amount, settlements to be made annually.

(3) It is understood and agreed that said transportation shall be furnished by the Railroad Company and availed of by the Telegraph Company in accordance with the Interstate Commerce Act of the Federal Congress.

ELEVENTH: The Railroad Company further agrees to transport to and from regular stations over the whole or any part of its railroad all officials, employees, laborers, material or supplies of the Telegraph Company, as desired by the Telegraph Company, in connection with the construction, maintenance or operation of the Telegraph Company's lines and service off the line of the Railroad Company, and the Telegraph Company agrees to pay in cash to the Railroad Company the Railroad Company's regular tariff rates now or hereafter established for all such transportation of men and material; and the Railroad Company shall pay to the Telegraph Company for telegraph service actually rendered hereunder at full rates up to the amount of cash paid by the Telegraph Company to the Railroad Company for the transportation of officials, employees, laborers, materials or supplies of the Telegraph Company, traveling or shipped in connection with the construction, maintenance or operation of the Telegraph Company's lines and service off the line of the Railroad Company the telegraph service so paid for being considered a part of the service (*at $12.00 or $10.00 per mile per annum as aforesaid*), to which the Railroad Company is entitled as hereinabove specified in Paragraph Ninth.

TWELFTH (1): The Railroad Company hereby grants to the Telegraph Company, subject to the terms and conditions hereinafter specified, the right, if it so elects, to erect, maintain and operate at its own cost and expense its wires upon the poles of the Railroad Company, now, or hereafter to be owned or erected by the Railroad Company,

on and along the line of railroad hereinabove specified, and future editions to and extensions thereof.

The Railroad Company hereby grants to the Telegraph Company, its agents and employees, the right to enter at all times upon the Railroad Company's right of way for the purpose of maintaining and repairing the Telegraph Company's said wires upon the poles of the Railroad Company, and also grants to the Telegraph Company the further right for said purpose to run upon the Railroad Company's tracks such hand cars, push cars and motor cars as may be necessary in the erection, maintenance and repair of the Telegraph Company's wires strung upon railroad poles, said cars to be used subject to the regulations of the Railroad Company and in such a manner as not to interfere with the operation of the Railroad Company's trains. The Railroad Company agrees to distribute the material necessary for the erection, maintenance and repair of the Telegraph Company's wires strung upon the Railroad Company's poles in such manner as may be desired by the Telegraph Company, including distribution between stations.

(2) The Railroad Company shall also furnish and erect any additional poles necessary for the proper support of the Telegraph Company's said wires. It being understood and agreed, however, that the Telegraph Company shall not erect more than six (6) wires between any two points on any one line of railroad, without the written consent of the Railroad Company first had in each case.

(3) Said wires of the Telegraph Company shall be erected, maintained and operated as not to interfere with the operation of the Railroad Company's railroad, or with the maintenance and operation of the Railroad Company's telegraph wires.

Answer.

(4) It is understood and agreed that said wires of the Telegraph Company maintained upon the Railroad Company's poles may be connected at the Telegraph Company's expense for the purpose of testing, into such of the Railroad Company's telegraph offices as may be designated by the Telegraph Company, and the Railroad Company agrees to furnish free of cost to the Telegraph Company the services of its employees necessary for the proper testing of said wires at said test office.

(5) The Telegraph Company hereby agrees to pay to the Railroad Company in quarterly installments as rental for said pole space at the rate of four dollars ($4) per mile per wire per annum for the first two wires; three dollars and a half ($3.50) per mile per annum for the third wire; three dollars ($3) per mile per annum for the fourth wire; and two dollars ($2) per mile per annum for all additional wires.

(6) It is understood and agreed as to all pole space upon which the Telegraph Company may elect to occupy on the Railroad Company's poles the Telegraph Company shall pay rental therefor to the Railroad Company for the term of at least five (5) years on each of the Telegraph Company's wires strung upon the Railroad Company's poles (said term beginning on dates when the respective wires are completed) and, thereafter, only during the further term of said occupancy. The Telegraph Company shall have the right at any time to remove any or all of its wires from the Railroad Company's poles.

(7) In the event that the Telegraph Company desires to have the Railroad Company maintain and pay the cost and expense of maintaining the Telegraph Company's wires so erected upon the Railroad Company's poles, the Railroad Company agrees to maintain, at its own cost and expense, any or all of the said wires of the Telegraph Com-

pany, if the Telegraph Company so requires, the Telegraph Company furnishing the necessary material therefor, and the Railroad Company agrees to repair any interruption to said wires of the Telegraph Company so maintained by the Railroad Company with the utmost diligence and promptness, and the Telegraph Company hereby agrees to pay the Railroad Company in quarterly installments as compensation for said maintenance at the rate of one dollar and a half ($1.50) per mile per wire per annum for the first two wires and one dollar ($1) per mile per wire per annum for all additional wires in case the Telegraph Company so desires, as follows:

THIRTEENTH (1): In the event of interruption between any two points to all of the wires belonging to the Railroad Company, the Telegraph Company agrees to allow the Railroad Company the exclusive use of one wire between said points for the handling of telegraph business pertaining strictly to the movement of the Railroad Company's trains, and the operation of its road, provided that at least two (2) of the Telegraph Company's wires shall be in working order.

In the event that all but one of the Telegraph Company's wires are interrupted, the Railroad Company shall have the right to use the working wire jointly with the Telegraph Company and important business of the Railroad Company, relating to the movement of its trains shall have precedent on said wire until one of the Railroad Company's wires shall be restored to working order. The Railroad Company shall then relinquish the Telegraph Company's wire and use its own wire, it being understood that the Railroad Company shall repair with the utmost diligence any interruptions to its own wires.

FOURTEENTH: The Railroad Company agrees

not to assign this agreement, or any part thereof, nor to extend to any telegraph or other company, firm or individual, the benefits thereof, without the consent of the Telegraph Company, party hereto first thereunto had in writing.

FIFTEENTH: The provisions of this agreement shall extend to all the lines of the Railroad Company now or hereafter owned or controlled by the Railroad Company and shall continue in full force and effect for the term of twenty-five (25) years from the date hereof and thereafter until either party shall have given to the other twelve (12) months' written notice of desire or intention to terminate the same.

SIXTEENTH: It is understood and agreed between the parties hereto that material *that the Telegraph Company is herein obligated to furnish* shall be furnished by the Telegraph Company and work on the commercial system of telegraph lines shall be commenced by the Railroad Company within sixty (60) days from the date this agreement becomes effective.

SEVENTEENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESSS WHEREOF, the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

POSTAL TELEGRAPH-CABLE COMPANY,

(Sgd.) E. J. NALLY,

(Seal.) Vice-President.

Attest:

J. O. STEVENS,

Secretary.

TONOPAH & TIDEWATER R. R. COMPANY,

(Sgd.) F. M. SMITH,

(Seal.) President.

Attest:
C. B. ZABRISKIE,
Secretary.

Ninth page, paragraph eleventh, second line from bottom, the words "(at $12.00 or $10.00 per mile per annum as aforesaid)" and last page, paragraph sixteenth, second line, the words, "that the Telegraph Company is herein obligated to furnish," inserted before execution. E. J. N.,
C. B. Z.

Judgment.

(Index Number 14,033, Year 1916.)

MUNICIPAL COURT OF THE CITY OF NEW YORK.

BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,*
against
TONOPAH AND TIDEWATER R. R. Co., *Defendant.*

Decision and Judgment. Trial.

I hereby find and decide that the defendant is entitled to judgment dismissing plaintiff's complaint with $5.00 cost after trial and on the merits. Opinion by the Court, and the clerk is hereby directed to enter judgment accordingly.

Ten days stay of execution.

Dated, June 30, 1916.

WAUHOPE LYNN,
Justice.

JUDGMENT.

Judgment is rendered in favor of defendant and against plaintiff for
Dollars, with $5.00 costs and disbursements as taxed, amounting in all to
Dollars ($).

Dated June 30, 1916.

THOMAS O'CONNELL, Clerk.

Case.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN,
FIRST DISTRICT—PART I.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,* *against* TONOPAH AND TIDEWATER R. R. CO., *Defendant.*	Index Number 14033—1916.

146 Grand Street,
New York, June 21, 1916.

Before:

HON. WAUHOPE LYNN, Justice.

Appearances:

WM. W. COOK, Esq. (Mr. Overbaugh, of Counsel), for the Plaintiff.

MESSRS. STEELE, DEFRIESE & STEELE, (Mr. of Counsel), for the Defendant.

CHARLES PATTERSON BRUCH, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. What is your name? A. Charles Patterson Bruch.

Q. Where do you live? A. 780 Park Avenue, New York.

Q. Mr. Bruch, are you employed by the plaintiff in this suit? A. Yes, sir.

Q. In what capacity? A. Vice-president.

Q. How long have you been vice-president? A. Over twenty-five years. I beg your pardon, I have not been vice-president over 25 years.

Q. How long? A. Ten or fifteen; I have forgotten.

Q. You have been employed by the plaintiff— A. For over 25 years.

Q. In what other capacities have you served? A. I have been the assistant secretary of the company and the assistant general manager of the company.

Q. Were you ever a telegraph operator yourself? A. Yes.

Q. You are familiar with the telegraph business generally? A. Yes, sir.

PLAINTIFF'S COUNSEL: I offer in evidence ruling of the Interstate Commerce Commission, dated March 28th, 1916.

Paper received and marked "Plaintiff's Exhibit 1."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Commission of December 21, 1906, being reported in 12 Interstate Commerce Commission reports, page 10.

Received and marked "Plaintiff's Exhibit 2."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Commission of June 3rd, 1907.

Received and marked "Plaintiff's Exhibit 3."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Comsion of June 30, 1908.

Received and marked "Plaintiff's Exhibit 4."

Q. Mr. Bruch, what have you to say, if anything, with respect to the attitude of the railroads throughout the United States after the ruling of the Interstate Commerce Commission of December 21, 1906? A. The railroads were governed by that ruling, and declined after that time for about four years—until 1910, to handle for the telegraph companies—free freight, and to transport telegraph men free, even though the contracts between the railroads and the telegraph companies obligated the railroads to carry the men free, except to the extent that the travel was in connection with the lines of the railroads themselves—travel and transportation of freight.

Q. Then do I understand you to say, after that ruling, the railroad companies would not transport telegraph men or materials free under the contracts when the men and material were destined to points beyond the line of that particular railroad? A. That is what I intended to say.

Q. And after that ruling did the railroads throughout the country refuse to carry out the contracts with the telegraph companies in that regard? A. Yes.

Q. Except, I take it, so far as the material or men were to be used or employed on the line of the railroad itself? A. That is right.

Q. And was that in accordance with the ruling of the Commission? A. Yes.

Q. During that time did the railroads offer to compensate telegraph companies for this variation from the contract? A. They did not.

Q. Did the plaintiff, the Postal Telegraph Cable Company, at any time litigate the legality of that ruling of the Interstate Commerce Commission? A. Yes, sir.

Q. And was that question litigated in the suit of Humbird and others against the Chicago Great

Western Railroad Company in the Circuit Court of the United States in Illinois? A. It was.

PLAINTIFF'S COUNSEL: I offer in evidence judgment roll in the suit of John A. Humbird, et al. against the Chicago, Great Western Railway Company, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Received and marked Plaintiff's Exhibit 5.

PLAINTIFF'S COUNSEL: I offer that judgment roll in evidence as a precedent and also in the nature of being an estoppel as to all the railroads.

Q. Mr. Bruch, did the Western Union Telegraph Company also institute a suit in any place in the United States with respect to the same matter? A. Yes, sir.

Q. To test the legality— A. (Interposing.) Yes, in a case against the Baltimore & Ohio.

Q. That was for the purpose of testing the legality of the then ruling of the Interstate Commerce Commission? A. I believe so.

Q. Was that suit entitled "Western Union Telegraph Company, a corporation, against the Baltimore & Ohio Railroad Company, a corporation, in the District Court of the United States for the District of Maryland"? A. That is the suit.

PLAINTIFF'S COUNSEL: I now offer in evidence the judgment roll in that suit.

Received and marked "Plaintiff's Exhibit 6."

Q. From 1906 to 1910, did the railroads of the United States, on account of this ruling of the Commission, refuse to give telegraph companies the free service called for by the contracts? A. To the extent that I have already explained.

Q. As you have already explained? A. Yes, sir.

Q. And during that time did the railroads take

full advantage of the then ruling of the Interstate Commerce Commission? A. They did.

Q. Mr. Bruch, has the plaintiff accepted the Post Road Act of Congress? A. Yes.

Q. And has the Western Union Telegraph Company also accepted the Post Road Act of Congress? A. Yes, the Western Union also.

PLAINTIFF'S COUNSEL: I offer in evidence the certificate of the Postmaster General, showing acceptance of the plaintiff of the act known as the Post Road Act of Congress of 1866, the acts amendatory thereof and supplementary thereto.

Marked "Plaintiff's Exhibit 7."

DEFENDANT'S COUNSEL: The defence on our part is a contract entered into between the plaintiff and the defendant.

THE COURT: I shall read your answer.

DEFENDANT'S COUNSEL: It is annexed to our answer; I assume that it is introduced at this point.

PLAINTIFF'S COUNSEL: And the testimony now and hereafter to be given is in rebuttal to that defense.

Q. Does this Post Road Act of Congress of July 24, 1866, enable the United States Government to take all the telegraph lines, both of the Postal and Western Union Telegraph Companies, at any time at an appraised value? A. It does.

Q. Is that one of the provisions of Section 5267 of the Revised Statutes of the United States which contains this Post Road Act of Congress? A. Yes.

Q. Mr. Bruch, as bearing upon the question whether the Interstate Commerce Commission in making its ruling of March 28th, 1916, committed abuse of discretion, constituting legal error, and also as bearing upon the principle of law that all

statutes including the Interstate Commerce Acts are to be construed most favorably to the interests of the public so far as it is consistent with the terms thereof, I would ask you whether, in case the United States Government should at any time hereafter exercise its power under the Post Road Act of Congress to take over the telegraph lines of the Postal and Western Union, the Government would have to pay a very much larger price if these railroad-telegraph contracts for the rendering of free telegraph service and free railroad service should continue, and other similar contracts made in the future? A. Yes, sir; in my opinion it would be a very much higher price.

Q. On the other hand, Mr. Bruch, if the Interstate Commerce Act as construed by the Commission in its ruling of March 28th, 1916, sustains that ruling, what would be the effect upon the price which the United States Government would have to pay for these telegraph lines hereafter in case the Government takes them over? A. The price would be less.

Q. What reason have you for saying this? A. From the experience of the British Post Office when it took over the telegraph lines about—in 1870.

Q. Do I understand you to say that the British Government took over the telegraph lines in that country about 1870? A. In or about 1870; my recollection is about 1870.

Q. (Handing paper.) Have you a copy of the act of Parliament authorizing the British Government to take over the telegraph lines in Great Britain? A. Yes, I have it here.

Q. I refer now to the act of Parliament of July 31, 1868, being 31 and 32 Victoria, page 887, and so forth, entitled "An act to enable Her Majesty's Postmaster General to acquire, work and maintain

electric telegraphs". Have you that act before you? A. I have it here.

PLAINTIFF'S COUNSEL: Now I offer in evidence Section "9" of that Act.

Received and marked "Plaintiff's Exhibit 8."

Q. I show you the bluebook, Mr. Bruch, issued by the British Government, ordered printed by the House of Commons on August 1st, 1911, and I ask you what that pertains to? A. It is a report from the Select Committee on the Telegraph Bill.

Q. Does it also contain the minutes of the evidence? A. It does.

Q. Is that an official document issued by the British Government? A. Yes, published by the Government.

PLAINTIFF'S COUNSEL: Now, I offer in evidence portion of the testimony of Sir Robert Hunter of July the 25th, 1911, as the same appears on pages 1, 2 and 3 of bluebook; and I would ask the stenographer to mark by a scroll that portion thereof which is now offered in evidence.

Received and marked "Plaintiff's Exhibit 9."

Q. Will you also turn to page 59 of that same bluebook and state whose testimony you find there? Is that the testimony of Sir Henry Norman? A. Yes, sir; it is the testimony of Sir Henry Norman.

PLAINTIFF'S COUNSEL: I offer in evidence that portion of Sir Henry Norman's testimony as indicated on page 59 of the bluebook, being Plaintiff's Exhibit 9.

Received and marked "Plaintiff's Exhibit 10."

PLAINTIFF'S COUNSEL: I also offer in evidence extracts from pages 410 and 411 of vol-

ume 31 of the Interstate Commerce reports.

Received and marked "Plaintiff's Exhibit 11."

Q. Mr. Bruch, have you with you the reports of the Postmaster General of Great Britain bearing upon the results of the operation by the British Government of the telegraph lines of that country from and including the year 1898? A. I have those reports in my hand.

Q. Have you studied those reports and are you able to state the results? A. Yes. and I have drawn off some figures in the shape of a table.

Q. You have tabulated them, have you? A. A tabulation of the figures.

Q. Is that tabulation correct? A. It is a tabulation of the operation of the British Government telegraphs.

Q. And it is in accordance with the figures found in those reports? A. Yes, sir.

Q. Is that the tabulation which you have made? A. This is it.

PLAINTIFF'S COUNSEL: I offer it in evidence.

Received and marked "Plaintiff's Exhibit 12."

Q. Mr. Bruch, as a telegraph man who has passed all his life in the telegraph business, both in the operation and administration, I would ask you whether, in your opinion, this large deficit in the operation of the British telegraph lines is due in large part to the railroad telegraph contracts existing between the telegraph companies and the railroad companies in Great Britain at the time the British Government took over the telegraph lines? A. Yes, that is my opinion.

Q. Mr. Bruch, you will notice that this recent ruling of the Interstate Commerce Commission of March 28th, 1916, involved in this suit, compels

the telegraph companies to pay the railroad companies on all freight and passenger service, except as the same are incurred in connection with the telegraph line along the particular railroad involved. I wish you would state in a general way how important that phase of the ruling is to the telegraph companies themselves? A. It is very important; it involves very large sums of money.

Q. Now you can explain briefly, if you will, how that is? A. Because the telegraph freight and material which has to be shipped by railroad is very large in amount and has to be shipped over long distances on account of the nature of the business.

Q. For instance, do telegraph poles have to be shipped from the timber country to points where there is no timber? A. I was going to mention that; I have here an instance—two instances—where we were obliged to ship poles, where the company was obliged to ship poles from a very considerable distance from where the poles were drawn and cut, the timber country, to where they were to be put up and used in a country where there was no timber.

Q. Used in the construction of the telegraph lines? A. Used in the construction of a line. In our construction of the line between Salt Lake and Reno, for the distance of about 476 miles, the poles cost us in the timber country $1 a pole, and the freight on them averaged $1.50 per pole. Now we used 20,160 split poles, which cost us cut, the poles themselves, $20,160.

Q. What did the freight on that cost? A. The freight cost us $30,240, an excess cost of freight over the cost of the poles themselves of $10,080. We had another case where we were reconstructing our line on the Santa Fe Railroad from Raton, New Mexico, to Lamy, New Mexico, a distance of 184 miles.

Q. That is the distance you had to haul poles? A. No, between those two points, in that distance we used 4,830 poles. We bought them in Oregon at $1 apiece and they cost us delivered $3.42 apiece. That is the aggregate amount—

Q. Just a moment. What was the cost of the poles in Oregon? A. I didn't get you.

Q. I say, what was the cost, therefore, of the poles in Oregon? A. The cost in Oregon was $4,830, $1 apiece. The cost of transportation made the value or the cost to us of the pole when it reached its destination $3.42, that is, including costs and freight.

Q. What was the actual freight cost on those poles? A. The actual freight was $11,688.60; that is $6,858.60 more than the poles themselves cost.

Q. Did you take those figures from the actual reports relating to that work? A. Yes, I took them from the actual reports.

Q. And they are accurate? A. And they are accurate.

Q. In addition to freight, what have you to say with respect to passenger force? A. The same thing is true. We have occasion in our business to travel very extensiely and over long distances. Our officers travel and our men travel in connection with the operation and construction and so forth of our lines and our plant.

Q. For instance, take an instance of the Illinois Central Railroad. Does the contract between the Postal Telegraph Cable Company and the Illinois Central Railroad require that company to transport our men free of charge over the lines of that railroad company, even though the men are doing work or are about to do work off the line of that railroad? A. Yes, that is the obligation of that contract upon the railroad.

Q. Now, under this recent ruling of the Interstate Commerce Commision, would all that free service on the part of the railroad company be cut

off if this ruling is sustained? A. It would.

Q. And with respect to passengers and men, would that also amount to a large sum, as well as freight? A. I was speaking of passengers just now.

Q. I say, would that aggregate a large sum for passengers? A. As to the telegraph service throughout the country? Yes, very large.

Q. And that same condition applies not only to the plaintiff but to the Western Union, I take it? A. Yes, sir.

Q. And applies throughout the United States? A. Yes, generally.

Q. To both companies? A. To both companies.

Q. I understand you to say that our men and especially the officers, sometimes have occasion to travel long distances, to reach the point where they are compelled to work upon the telegraph lines? A. Yes, sir.

THE COURT: Why so elaborate in this matter?

PLAINTIFF'S COUNSEL: I want to make a record. I am about through now.

Q. Can you say exactly how much these passenger force and freight bills would amount to which the telegraph companies will now have to pay for instead of getting free under the old time contracts—can you say how much that would amount to in exact figures? A. No, it would be impossible for me—

Q. Would it be a large or a small amount? A. It would be a very large amount; impossible to say exactly how much.

Q. Would all of that be lost to the telegraph companies if the present ruling of the Interstate Commerce Commission is sustained? A. It would.

DEFENDANT'S COUNSEL: No cross examination.

PLAINTIFF'S COUNSEL: That is our case.

THE COURT: Let us hear the defense.

DEFENDANT'S COUNSEL: The defense is very simple. We admit all the allegations of the complaint. Our defense is, the provisions of the contract entered into between the Postal Telegraph Company and the Tonopah & Tidewater Railroad Company on the 20th of June, 1897, whereby the telegraph company agreed to send messages having to do with the business of the railroad company, free of charge, anywhere in the United States up to a certain amount. There is no allegation that we have exceeded that amount and I think it is admitted by the complaint that messages were sent in connection with the railroad business. On that ground we ask that the complaint be dismissed as there are no—we are free from paying for these services by contract. A true copy of the contract is annexed to the answer, and I think that it is admitted to be a true copy of the contract.

THE COURT: You are submitting that contract in evidence?

DEFENDANT'S COUNSEL: It has been offered in evidence.

THE COURT: You had better send me a memorandum if you care to. June 28th for any briefs that you want to submit in the matter.

PLAINTIFF'S COUNSEL: Do I understand that the contract is in evidence?

DEFENDANT'S COUNSEL: It is assumed to be in evidence, a copy is annexed to the answer.

THE COURT: Better put a copy of the contract in evidence.

Copy of contract is received and marked "Defendant's Exhibit A."

Exhibits returned to counsel.

Exhibits.

Plaintiff's Exhibit No. 1 is the ruling of the Interstate Commerce Commission of March 28th, 1916.

Plaintiff's Exhibit No. 2 is the ruling of the Interstate Commerce Commission of December 21st, 1906.

Plaintiff's Exhibit No. 3 is the ruling of the Interstate Commerce Commission of June 3rd, 1907.

Plaintiff's Exhibit No. 4 is the ruling of the Interstate Commerce Commission of June 30th, 1908.

Plaintiff's Exhibit No. 5 is the judgment roll in the suit of John A. Humbird et al against Chicago and Greatwestern Railway Company in the Circuit Court of the United States for the Northern District of Illinois Eastern Division.

Plaintiff's Exhibit No. 6 is the judgment roll in the suit of Western Union Telegraph Company against Baltimore & Ohio Railroad Company in the District Court of the United States for the District of Maryland.

Plaintiff's Exhibit No. 7 is the certificate of the Postmaster-General of the United States showing that the plaintiff has duly accepted the terms of the Post Road Act of Congress or 1866 and the Acts amendatory thereof and supplemental thereto.

Plaintiff's Exhibit No. 8 is Section 9 of the Act of the English Parliament of July 31, 1868, entitled "An Act to enable her Majesty's Postmaster-General to acquire, work and maintain electric telegraphs", being 31 and 33 Victoria 887, etc.

Plaintiff's Exhibit 9 is a portion of the testimony of Sir Robert Hunter of July 25th, 1911, the same appearing on pages 1, 2 and 3 of the Blue Book issued by the British Government and ordered printed by the House of Commons on

August 1, 1911, and containing the report of a select Committee on the Telegraph Bill.

Plaintiff's Exhibit No. 10 is a portion of the testimony of Sir Henry Norman, appearing on page 59 of the above mentioned Blue Book.

Plaintiff's Exhibit No. 11 is extracts from pp. 410 and 411 of Vol. 31 of the Interstate Commerce Commission Reports.

Plaintiff's Exhibit No. 12 is the tabulation made by the plaintiff's witness Mr. Bruch, showing certain results of the operation of the telegraph lines by the British Government and based upon reports of the British Postmaster-General.

Defendant's Exhibit A is the contract between the plaintiff and defendant, a copy of which is attached to the defendant's answer and heretofore printed in full in this record.

Opinion.

MUNICIPAL COURT OF THE CITY OF NEW YORK.

BOROUGH OF MANHATTAN, FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant.

This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to the facts, and hence that question of law stands out clear and distinct. It is whether the Interstate Commerce Act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28th, 1916, is constitutional under the Constitution of the United States, as applied to the contract in evidence in this case, between the plaintiff and defendant, made prior to the Act of Congress of June 18th, 1910, which placed telegraph companies within the Interstate Commerce Act. In other words, could an Act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the Interstate Commerce Act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract, is unconstitutional and accordingly I direct judgment for the defendant.

WAUHOPE LYNN,
Justice.

Stipulation.

IT IS HEREBY STIPULATED that the foregoing consists of true and correct copies of the notice of appeal and of all the papers used before the court on the trial from which this appeal is taken, and the whole thereof with the exception of the Stenographer's Minutes, which are now on file in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and certification thereof is hereby waived.

IT IS FURTHER STIPULATED that the exhibits in this case may be produced upon the appeal with the same force and effect as though they were attached to the case on appeal, and such exhibits shall be considered as a part of the record.

Dated, New York, July 5th, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Stipulation Settling Case.

IT IS HEREBY CONSENTED that the within case on appeal be filed as settled, and notice of settlement thereof is hereby waived.

Dated, New York, July 5th, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Order of Affirmance.

At a Term of the Supreme Court held for the hearing of appeals from the City and Municipal Courts of the First Judicial Department at the County Court House, in the City of New York, Borough of Manhattan, on the 2nd day of November, 1916.

Present:

Hon. CHARLES L. GUY,
Hon. NATHAN BIJUR,
Hon. CLARENCE J. SHEARN,
Justices.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff-Appellant,* *against* TONOPAH AND TIDEWATER RAILROAD COMPANY, *Defendant-Respondent.*	Order of Affirmance of a judgment of the Municipal Court, October, No. 86.

The above named plaintiff having appealed to the Supreme Court from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, rendered on the 30th day of June, 1916, and the said appeal having been heard, and due deliberation having been had thereon, it is

ORDERED AND ADJUDGED, that the judgment of the said Municipal Court be and the same is hereby affirmed with costs to the respondent, with leave to the plaintiff to appeal to the Appellate

Division, First Department.

Enter:

CHARLES L. GUY,
Justice Supreme Court sitting in App. Term.

NATHAN BIJUR,
Justice Supreme Court sitting in App. Term.

CLARENCE J. SHEARN,
Justice Supreme Court sitting in App. Term.

Judgment of Affirmance.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH CABLE COMPANY,
Plaintiff,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant.

1916, Nov. 2. Judgment affirmed with $25.00 costs to Respt. with leave to the Plft. to appeal to the App. Div., First Dept.

Affidavit of no Opinion.

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

WILLIAM W. COOK, being duly sworn, deposes and says that he is the attorney for the plaintiff-appellant herein; that no opinion was handed down by the Justices of the Appellate Term upon the affirmance of the judgment of the Municipal Court herein.

WILLIAM W. COOK.

Sworn to before me this
day of November, 1916.

Richard T. Thompson,
Notary Public, Kings County No. 22
Certificate Filed in New York County No. 46.

Stipulation with Respect to Exhibits.

IT IS HEREBY STIPULATED that the Exhibits in this case may be produced upon the appeal in the Appellate Division with the same force and effect as though they were attached to the case on appeal therein, and such Exhibits shall be considered as a part of this record.

Dated, New York, November 10, 1916.

STEELE, DEFRIESE & STEELE,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Stipulation Waiving Certification.

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-Respondent.

Pursuant to §3301 of the Code of Civil Procedure it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal to the Appellate Term, of the order of affirmance of the judgment of the Municipal Court, and of the whole thereof now on file in the office of the Clerk of the County of New York, and of the judgment of affirmance entered in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and of the whole thereof, and certification thereof by the Clerk pursuant to §1353 of the Code of Civil Procedure is hereby waived.

Dated, New York, November 10, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant-Respondent.

47 At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York, on the 26th day of January, 1917.

Present: Hon. John Proctor Clarke, Presiding Justice; Frank C. Laughlin, Victor J. Dowling, Walter Lloyd Smith, Alfred R. Page, Justices.

6.5.

Postal Telegraph-Cable Company, App'l't,

vs.

Tonopah and Tidewater Railroad Company, Resp't.

Affirmance of Order.

An appeal having been taken to this court by the plaintiff from a determination of the Supreme Court, Appellate Term, entered on the 2nd day of November, 1916, affirming a judgment of the Municipal Court, Borough of Manhattan, First District, entered on the 30th day of June, 1916, and from the judgment of said Municipal Court thereupon entered on the 2nd day of November, 1916.

And said appeal having been argued by Mr. William W. Cook, of counsel for the appellant, and by Mr. Porter Steele, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby unanimously ordered that the determination and judgment so appealed from be and the same are hereby affirmed with costs and disbursements.

And it is hereby further unanimously ordered that leave to appeal from this order to the Court of Appeals be and the same hereby is denied.

Enter,

J. P. C.

[Endorsed:] Postal Telegraph-Cable Company, App'l't, vs. Tonopah and Tidewater Railroad Co., Resp't. Copy. Order of Affirmance by Appellate Division.

48 Supreme Court of the State of New York, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

To the Hon. John Proctor Clarke, presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:

The petition of the Postal Telegraph-Cable Company respectfully shows:

1. That your petitioner at and during all the times mentioned in the record herein was and now is a domestic telegraph corporation of the State of New York doing business as such between points within the state of New York and points in other states, and was and now is subject to the provisions of the Act of Congress of February 4th, 1887, known as an Act to Regulate Commerce, and the Acts amendatory thereof and supplementary thereto.

2. That this action was commenced in the Municipal Court of the City of New York to recover the regular tolls on telegrams which had been handed by the defendant to the plaintiff for regular transmission to various points in the United States and had been charged by plaintiff to defendant on the books of the plaintiff. That the regular tolls on such telegrams for the period covered by such complaint were $7.32.

49 3. In its answer the defendant admitted the transmission of said telegrams and the accuracy of said charges but alleged the reason the defendant refused to pay therefor was on account of a contract between plaintiff and defendant by which said telegrams would be transmitted by plaintiff without pay except in consideration of the provisions of said contract, a copy of which was attached to the answer.

4. On the trial the contract was introduced in evidence by the defendant. The plaintiff introduced in evidence a ruling of the Interstate Commerce Commission of March 28th, 1916, to the effect that such telegrams must be paid for by the Railroad Company in cash or by an equivalent amount of railroad transportation notwithstanding such a contract as is mentioned above, said ruling of said commission being its construction of the Act of Congress aforesaid. Other testimony and documentary evidence was introduced in evidence by plaintiff to sustain such ruling of the Commission.

5. The learned Judge of the Municipal Court however, rendered judgment for the defendant on the ground that the Interstate Commerce Act as construed by the Interstate Commerce Commission was unconstitutional as so construed. Thereupon plaintiff, your petitioner, duly appealed to the Appellate Term of the Supreme Court

of the State of New York for the First Judicial District and said Appellate Term duly affirmed the said judgment of the said Municipal Court with leave to appeal to this Appellate Division, without writing an opinion setting forth its reasons therefor, but with permission to plaintiff to appeal to the Appellate Division. Thereafter and
50 on the 2nd day of November, 1916, judgment was entered in the said Municipal Court *from* the said order and determination of said Appellate Term in favor of the defendant against the plaintiff, your petitioner. Thereupon the plaintiff, your petitioner, duly appealed to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department from the order and determination of the Appellate Term aforesaid, and said Appellate Division duly affirmed the said order and determination of said Appellate Term without writing an opinion setting forth its reasons therefor. Thereafter and on January 26th, 1917, judgment was entered in the Municipal Court of the City of New York, *from* the said order and determination of the said Appellate Division in favor of the defendant against the plaintiff, your petitioner. Under the statutes of the State of New York in such case made and provided no appeal could be taken to a higher court than this Appellate Division of the State of New York without such leave to appeal. That the above mentioned orders and judgments were in the highest court of New York State in which a decision in this suit could be had.

6. Your petitioner further respectfully shows to the court that in the record and proceedings had in the above entitled action, and also in the rendition of the final order and judgment in the Appellate Division and Appellate Term of the Supreme Court and the Municipal Court of the City of New York, there was drawn in question the validity of a statute of or an authority exercised under the United States and a title, right, privilege and immunity specially set
51 up and claimed by your petitioner under a statute of the United States; namely, the Act to Regulate Commerce of February 4, 1887, and the acts amendatory thereof and supplementary thereto, and that the decisions of the said courts were adverse to their validity and such title, right, privilege and immunity so set up and claimed by your petitioner under said statute. Your petitioner claimed a title, right and privilege or immunity under a Commission held or authority exercised under the United States, and the decisions mentioned above were against the title, right, privilege or immunity especially set up or claimed by your petitioner under such Commission or authority.

7. Your petitioner further respectfully shows that on the record and proceedings herein there is manifest error and your petitioner attaches hereto and makes a part hereof its assignments of such errors.

Wherefore your petitioner prays that a Writ of Error may be allowed to issue from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York, in the First Judicial District in order that the errors set forth may be corrected and that the decision and judgment may be reversed and

that a duly authenticated transcript of the record and proceedings herein may be sent to the Supreme Court of the United States.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

52 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

Now comes the plaintiff-appellant (plaintiff in error) in the above entitled case and in connection with its petition for a writ of error from the Supreme Court of the United States, makes this its assignment of errors.

1. The Appellate Division of the Supreme Court of the State of New York for the First Judicial District erred in affirming the determination, order and judgment of the Appellate Term and Municipal Court of the City of New York.

2. The said Appellate Division erred in not reversing the said determination, order and judgment of the Appellate Term and Municipal Court.

3. The said Appellate Division erred in failing to hold that the agreement entered into between the plaintiff and the defendant June 26, 1907, which purported to obligate the plaintiff to transmit interstate telegrams was therefore subject to the provisions of the Act of Congress approved February 4, 1887, known as the Act to Regulate Commerce and the Acts amendatory thereof and supplementary thereto, and in particular the Act of Congress approved June 18, 1910.

53 4. The said Appellate Division erred in holding that on and after June 18, 1910, it was not unlawful and violative of the said Acts of Congress for the plaintiff to transmit for defendant interstate telegrams without being paid therefor except in accordance with the terms of said contract.

5. The said Appellate Division erred in holding that the plaintiff is not entitled to recover from defendant the regular rates for the transmission of said interstate telegrams, namely, Seven and 32/100 Dollars ($7.32) the amount sued for.

6. The said Appellate Division erred in holding that the enactment and going into effect of the Act of Congress hereinbefore mentioned, approved June 18, 1910, did not operate as a cancellation of the said contract between the parties to the above entitled action so far as said contract required plaintiff to transmit said telegrams without collecting the regular tolls therefor.

7. The said Appellate Division erred in holding that the enact-

ment and going into effect of the Act of Congress hereinbefore mentioned, approved June 18, 1910, did not exonerate, excuse, and release the plaintiff from any continued, further or additional obligation to the defendant under or in respect of said contract between the parties to the above entitled action so far as the transmission of interstate telegrams was and is concerned.

8. The said Appellate Division erred in sustaining the decision of the said Appellate Term and Municipal Court that said Act of Congress approved February 4, 1887, as so construed by the Interstate Commerce Commission, was and is unconstitutional.

54 9. By reason and in view of the enactment and going into effect of the Act of Congress ap-roved June 18, 1910, hereinbefore mentioned, said Appellate Division erred in holding in this action plaintiff was not entitled to recover the regular tolls on said interstate telegrams.

Wherefore, the Postal Telegraph-Cable Company prays that said judgment, final order and determination may be reversed, annulled and set aside, and that the plaintiff-appellant be restored to all things which it has lost because of said judgment, final order and determination.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

Office and Post Office Address, 44 Wall Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Edward Reynolds, being duly sworn says that he is an officer of the Postal Telegraph-Cable Company, your petitioner above named, to wit, a Vice President thereof; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

EDWARD REYNOLDS.

Sworn to before me this 29th day of January, 1917.

[Seal Robert J. Hall, Notary Public, Kings County, N. Y.]

ROBERT J. HALL,
Notary Public, Kings County, No. 65;
Certificate Filed in N. Y. Co., No. 136.

55 [Endorsed:] Co. Clk's Index No. 32562-16. Supreme Court, Appellate Division, First Department. Postal Telegraph-Cable Company, Plaintiff-Appellant, against Tonopah and Tidewater Railroad Company, Defendant-Respondent. Original. Petition for Writ of Error and Assignment of Errors. William W. Cook, Attorney for Plaintiff-Appellant, 44 Wall Street, New York

City. Service of a copy of the within papers is hereby admitted. Dated, New York, Jan'y 29, 1917. Steele, De Friese & Steele, Att'ys for Defendant-Respondent.

56 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

The above entitled matter coming on to be heard upon the petition of the appellant herein for a Writ of Error from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and upon an examination of the said petition and the record in the said matter,

It is ordered, that a Writ of Error be, and hereby is, allowed to this court from the Supreme Court of the United States and that the petitioner file a bond in amount of $250.

Granted this 29th day of January, 1917.

JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial District.

57 [Endorsed:] Co. Clk. Index No. 32,562-16. Supreme Court Appellate Division, First Department. Postal Telegraph-Cable Company, Plaintiff-Appellant, against Tonopah and Tidewater Railroad Company, Defendant-Respondent. Order Allowing Writ of Error. William W. Cook, Attorney for Plaintiff-Appellant, 44 Wall Street, New York City. Service of a copy of the within proposed order is hereby admitted. Dated, New York, Jan'y 29, 1917. Steele, De Friese & Steele, Att'y- for def't-respon't.

58 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New York constituting the Appellate Division for the First Judicial District and Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea in the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, being the highest court of law of the said state in which a decision could be had in said suit between Postal Telegraph-Cable Company, plaintiff, and Tonopah and Tidewater Railroad Company, defendant, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege and immunity specially set up or claimed under such statute,

a manifest error hath happened, to the great damage of the said Postal Telegraph-Cable Company, as by its petition appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right
59 and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 30th day of January 1917.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court for the Southern District of New York.

Allowed this 31st day of Jan. 1917.
JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court, First Department.

60 [Endorsed:] In the Supreme Court of the United States. M 2-143. Postal Telegraph-Cable Company, Plaintiff-in-Error, against Tonopah and Tidewater Railroad Company, Defendant-in-Error. Writ of Error. William W. Cook, Att'y for Plaintiff-in Error, Office & P. O. Address: 44 Wall-street, N. Y. City. Service of a copy of the within writ of Error is hereby admitted. Dated, New York, ——.

61 UNITED STATES OF AMERICA, *ss:*

To Tonopah and Tidewater Railroad Company, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, wherein the Postal Telegraph-Cable Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John Proctor Clarke, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York

for the First Judicial Department, this 31st day of January, in the year of our Lord One Thousand Nine Hundred and Seventeen.

JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Department.

62 [Endorsed:] Supreme Court of the United States. County Clerk's index No. 32562, Year 1916. Postal Telegraph-Cable Company, Plaintiff-in-Error, against Tonopah and Tidewater Railroad Company, Defendant-in-Error. (Original.) Citation. William W. Cook, Att'y for Plaintiff, 44 Wall-street, Manhattan, N. Y. City. Service of a copy of the within Citation is hereby admitted. Steele, De Friese & Steele, Att'y- for defendant in error. Dated, Jan. 31, 1917.

63 American Surety Company of New York.

Capital $5,000,000.

Company's Office Building, 100 Broadway New York.

Appellate Division of the Supreme Court for the First Department.

POSTAL-TELEGRAPH CABLE CO., Plaintiff and Appellant,
against
TONOPAH & TIDEWATER RAILROAD COMPANY, Defendant and Respondent.

Whereas, the Postal-Telegraph Cable Co. Plaintiff and Appellant feeling aggrieved by the order of the Appellate Division of the Supreme Court for the First District, dated — affirming the judgment of the Supreme Court, State of New York dismissing the complaint herein, desires to appeal therefrom to the Supreme Court of the United States of America.

Now, therefore, the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City of New York, does hereby pursuant to the Statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal not exceeding Two Hundred Fifty Dollars ($250.00).

Dated, New York January 30th, 1917.

AMERICAN SURETY COMPANY
OF NEW YORK,
By W. H. E. REINECKE,
Resident Vice-President.

Attest:
[L. S.] LOUIS PAPEN,
Resident Assistant Secretary.

64 STATE OF NEW YORK,
County of New York, ss:

On this day of Jan. 30, 1917, before me personally appeared W. H. E. Reinecke, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said W. H. E. Reinecke further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said W. H. E. Reinecke, Resident Vice President.

[L. S.] W. C. LLOYD,
Notary Public, Kings County.

Ctf. Filed in N. Y. Co., N. Y. Co. No. 84, Kings Co. No. 19, Kings Co Reg. No. 8021, N. Y. Co. Reg. No. 8059, Certificates filed in all Counties. Term expires March 30th, 19—.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 16, 1917, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 12, 1916, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.
New York, N. Y.

Resident Vice-Presidents.	Resident Assistant Secretaries.
Marshall L. Brower.	Marshall L. Brower.
A. E. Cotterell.	William H. Bishop.
William M. Tomlins, Jr.	A. E. Cotterell.
Lester S. Moore.	Charles S. Waterbury.
William H. Bishop.	Daniel Stewart.
George R. Crosby.	E. D. Sadler.
W. H. E. Reinecke.	George R. Crosby.
E. D. Sadler.	W. H. E. Reinecke.
	E. J. Sabater.
	Louis Papen.
	Benjamin A. Willis.
	Robert L. Neptune.
	Peter H. May.

* * * * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Com-

pany, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 23rd day of January, 1917.

(Signed) W. H. RILEY,
Assistant Secretary.

[L. S.]

65 [Endorsed:] Appellate Division of the Supreme Court for the First Department. 576. Postal-Telegraph Cable Co. Plaintiff & Appellant against Tonopah & Tidewater Railroad Company, Defendant & Respondent. Undertaking on Appeal. I approve of the within undertaking both as to form and sufficiency of the surety. John Proctor Clarke, Presiding Justice. Filed Jan. 31, 1917. Alfred Wagstaff, Clerk.

66 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

STATE OF NEW YORK,
County of New York, ss:

William W. Cook, being duly sworn, deposes and says that he is an attorney and counsellor at law, at New York City, and is attorney for the plaintiff-appellant herein, and that no opinion was handed down by the Justices of the Appellate Division upon the affirmance of the judgment of the Appellate Term herein.

WILLIAM W. COOK.

Sworn to before me this 31st day of January, 1917.

[Richard T. Thompson, Notary Public, Kings County.]

RICHARD T. THOMPSON,
Notary Public, Kings County, No. 22;
Certificate Filed in New York County, No. 46.

[Endorsed:] Postal v. Tonopah. Original. Affidavit of no opinion.

67 UNITED STATES OF AMERICA:

Appellate Division of the Supreme Court, First Judicial Department.

Clerk's Office.

COUNTY OF NEW YORK,
State of New York, ss:

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered 1 to 47 inclusive contain a true and complete transcript of the record and proceedings had in the cause of Postal Telegraph Cable Company, plaintiff and appellant in said Court, and plaintiff in error in the United States Supreme Court, against the Tonopah and Tidewater Railroad Company, defendant and respondent in the said first named court, and defendant in error in the United States Supreme Court, as the same remain of record and on file in said office and that the same together with the annexed original petition for writ of error, and assignment of errors, order granting writ of error, writ of error, the original citation to the defendant in error, and copy of the appeal bond, constitute the return of the said writ of error.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the Court House of the Supreme Court for the First Judicial Department in the County of New York and have hereunto set my hand this 7th day of February, A. D. 1917.

[Seal Supreme Court, Appellate Division, First Department.]

ALFRED WAGSTAFF, *Clerk.*

68 PLAINTIFF'S EXHIBIT NO. 1.

Interstate Commerce Commission.

WASHINGTON, March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accord-

ance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

P. Ex. 1. June 21, '16.

69 PLAINTIFF'S EXHIBIT NO. 2.

In the Matter of Railroad-Telegraph Companies.

Petition of the Western Union and Postal Telegraph Companies.

Decided December 21, 1906.

As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a "railway system," may lawfully contract to furnish free or reduced-rate transportation to a telegraph company for such of its officers, men, materials, and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced-rate transportation is not affected by the fact that the telegraph company may also use such telegraph lines in connection with its telegraph service to the public.

But such a railroad company or system of roads cannot lawfully contract in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way to furnish free or reduced-rate transportation for the officials, employees, laborers, materials or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads and upon the line or lines of another carrier or system.

Previous rulings of the Commission in relation to "Pay-
70 ment for transportation" and "Issuance and use of free passes," so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed.

Report and Opinion of the Commission.

By the COMMISSION:

On September 15, 1906, the Commission formally announced in a general tariff circular the following administrative ruling:

Payment for transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act

whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property, or other payment, in lieu of the amount of money specified in the published schedules.

On October 12th, 1906, the Commission announced an administrative ruling as follows:

Issuance and use of free passes.—The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interests of, a carrier by which he is employed.

Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such ar-
71 rangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

In making the above ruling of October 12 the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain purposes, apply, inter alia, to materials, supplies, and men required under contracts between railroad and telegraph companies for the construction, maintenance, and operation of telegraph lines upon and along the rights of way of such railroad companies and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own right of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by the carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their own right of way, in the performance by such companies of a telegraph service for the public.

On November 9 the Commission heard the arguments of counsel for the Western Union and Postal Telegraph Companies in support

of their petition, filed with the Commission, for a modification of the above rulings so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, in consideration of the free telegraph service accorded by the petitioners over wires of the lines of the respective contracting railroad companies, the
72 latter agree to furnish free or reduced-rate transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation, and maintenance of such telegraph lines off the lines of the respective contracting carriers, and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

After a careful consideration of the oral arguments of counsel and of the printed and typewritten briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interests adversely. Nevertheless, the Commission knows of no provision or law now in force that vests it with any authority or any clause in the law that affords it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, make agreements with shippers, tracing the freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free
73 or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in the telegraph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a "railway system"; and that, in consideration of the construction, maintenance, and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials, and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under
74 the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines.

Except as the rulings of the Commission are herein explained and applied, the petition of the telegraph companies is denied.

[Endorsed:] P. Ex. 2. June 21, '16.

75 PLAINTIFF'S EXHIBIT NO. 3.

Transportation of Men or Property for Telegraph Companies (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operating of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is 'off the line' business and is to be considered as commercial business. The same dis-

tinction is to be observed in the hauling of materials and
76 supplies for telegraph companies with which the railway company has contract for telegraphic service.

77 PLAINTIFF'S EXHIBIT No. 4.

Ruling of Interstate Commerce Commission of June 30th, 1908.

Notice as to the Issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transporation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1. Officers or employees of news companies other than newsboys.

2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. * * *.

[Endorsed:] P. Ex. 4. June 21, '16.

78 PLAINTIFF'S EXHIBIT No. 5.

P. Ex. 12. June 8/16.

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

79 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery, Sitting at the United States Court-room, in the City of Chicago, in said District and Division, Before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the Fourth Day of May, 1910, Being One of the Days of the December Term of said Court, Begun Monday,

the Twentieth Day Thereof, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States of America the One Hundred and Thirty-fourth year.

Present: Hon. Christian C. Kohlsaat, Circuit Judge, presiding; Luman T. Hoy, United States Marshal for said District, and H. S. Stoddard, Clerk of said Court.

80 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28934.

JOHN A. HUMBIRD, GEORGE T. MEYER, WALTER CUNLIFFE, ALEXANDER F. WALLACE, EDWIN WATERHOUSE, and EDWARD P. TENNANT

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Be it remembered, that heretofore to-wit: on the twenty-third day of January, 1908, in the record of proceedings thereof in the above entitled cause, appears before the Honorable Christian C. Kohlsaat, Circuit Judge, the following entry to-wit:

28934.

JOHN A. HUMBIRD, GEORGE T. MEYER, WALTER CUNLIFFE, ALEXANDER F. WALLACE, EDWIN WATERHOUSE, and EDWARD P. TENNANT

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Ordered, that Albert R. Moore, of St. Paul, Minnesota, be and he is hereby appointed Special Master in Chancery, in this cause, to whom shall be referred, as of course, all matters arising in the progress of this cause, which by the rules and practice of this Court, or by the general or special orders of the Court, are required or proper to be referred to a Master in Chancery; said Albert R. Moore, being the Special Master heretofore appointed in that certain cause pending in the Circuit Court of the United States for the District of Minnesota, the Court of primary jurisdiction in said cause, wherein John A. Humbird, et al., are plaintiffs, and Chicago Great Western Railway Company is defendant, and in which said
81 cause Alpheus B. Stickney and Chas. H. F. Smith, the Receivers herein, were originally appointed Receivers.

The Special Master is hereby authorized to establish and maintain his office at the city of St. Paul, in the state of Minnesota, the headquarters of the said Receivers appointed in this cause, their principal

accounting and operating offices as such receivers being situated at said city of St. Paul, in the state aforesaid, and may, in his discretion, hold a Master's Court at any point in this district he may designate, whenever he is satisfied that costs and expenses may be saved to the estate, or the convenience of the parties promoted by so doing, and shall hold court in this district whenever any witnesses residing in this district are to be examined & so desire.

Whenever the receivers in this cause shall file their reports in the office of the Master in this cause, such Master, with the assistance of one or more competent accountants, whom he is authorized to select and employ, will proceed to examine said reports. For the purpose of making said examination the Master, when he deems it necessary may summon the receivers and any of their employes, and any other persons before him, and examine them under oath touching any and all matters involved in said reports.

The Master, by himself and his accountants, is authorized to visit the office or offices of said receivers, and their accounting offices, wherever kept, and as often as necessary, to examine all books, vouchers, papers and correspondence *with* in his opinion may
82 be necessary for a full and accurate understanding of the reports of said receivers, and said Master is authorized to demand from said receivers and their clerks, agents and accountants, copies of all vouchers, papers and books which he may deem necessary to a full and complete examination of the reports of said receivers.

The Master will proceed with all convenient dispatch in the examination of said reports, and as soon as his examination of any report is completed, will prepare and file his report thereon, together with the report of the receivers, in the office of the clerk of this court.

The Receivers shall make and file their reports in the Special Master's office at St. Paul, Minnesota, and shall include therein all matters of administration in the jurisdiction of other Courts.

83 And afterwards to-wit: on the twentieth day of May, 1909, came the Postal Telegraph-Cable Company, by its solicitors and filed in the Clerk's office of said Court in said entitled cause its certain Intervening Petition in words and figures following to-wit:

84 *Intervening Petition of Postal Telegraph-Cable Company.*

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

To the Honorable Christian C. Kohlsaat, Judge of said Court, in Chancery Sitting:

Your Petitioner, the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, complains of Charles H. F. Smith and Horace G. Burt, receivers of the Chicago Great Western Railway, and alleges as follows:

1. That your Petitioner, the Postal Telegraph-Cable Company, is a corporation organized under the laws of the state of New York, having power and authority under its articles of incorporation to own, construct, use and maintain lines of electric telegraph within and also beyond the limits of the State of New York and that the lines of telegraph owned and controlled and maintained by your Petitioner extend unto and through the several states of the Union and connect with ocean telegraph cables at the Atlantic and Pacific seaboards.

2. That the Chicago Great Western Railway Company is a corporation of the States of Illinois, Iowa and Minnesota and that it is the successor in law to the Chicago, St. Paul and Kansas City
85 Railway Company, a corporation of the state of Iowa, and the lessee of the Mason City and Fort Dodge Railway Company, also a corporation of the State of Iowa.

3. That on the twenty-first day of December, 1888, an agreement was entered into by and between the Chicago, St. Paul and Kansas City Railway Company and your Petitioner, a copy of which agreement is hereto attached as "Exhibit A" and made a part of this petition to the same extent as though it had here been inserted in full.

4. That said contract recites that said Railway Company owns and operates a railway extending from the City of Chicago to Minneapolis, via Dubuque, Oelwein and St. Paul and from Oelwein via Marshalltown and Des Moines, Iowa to St. Joseph, Missouri, with various branches as in said agreement set forth, and that said Railway Company owns and operates a line of telegraph consisting of

poles and two wires covering nearly the whole of said route and that the said Telegraph Company owns and operates lines of telegraph reaching the principal cities of the United States North of and including St. Louis, Cincinnati, and Washington City, and East of the Missouri River and, by its connections the principal cities and towns in British America and on the Pacific Coast, and, via the Commercial Cable Company all points in the Old World, and was engaged in extending its lines into the Southern states.

5. That said agreement further recites that the Telegraph Company should take charges of the telegraph lines and property of the Railway Company on the first day of January, 1889, and it grants and assures the Telegraph Company the exclusive right of way on and along the line, lands and branches of said Railway Company and on any extensions and branches thereof, for the construction and use of lines of poles and wires, with the right to put up and construct from time to time such additional wires, or such ad-
86 ditional lines of poles as the Telegraph Company may find necessary for its business. The Railway Company further agrees to furnish all labor necessary for the maintenance, repair and renewals of said telegraph lines and for any extensions thereto that may thereafter be made upon the property that was then or might thereafter be owned or controlled by the Railway Company and to furnish office rooms in its railway stations.

6. That it was further provided under section three of said agreement, that the Railway Company should transport, free of charge over its railway, upon the application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company, when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway, all poles and other material or supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by said agreement, and of such additional lines of poles and wires as might be erected under the provisions of said agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties to said agreement at places along and adjacent to said Railway.

7. That the said Telegraph Company further agreed to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials necessary for the maintenance and repair of said lines and of any extensions thereof that might thereafter be made, and all battery, instruments and apparatus necessary for operating the same, together with blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office was then or might thereafter be maintained;

87 8. That the Telegraph Company further agreed to pay to the Railway Company the sum of eighty-seven thousand dollars ($87,000.00) in three equal payments of twenty-nine thousand dollars ($29,000.00) on July 1st, 1889 and on January 1st and July 1st, 1890;

9. That the Telegraph Company further agreed to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of ten dollars ($10.00) (subsequently, under contract dated November fifth, 1902, between said Chicago Great Western Railway and your Petitioner changed to twelve dollars ($12.00) per mile of railway per annum, including any extensions that might thereafter be made of said Railway, said business being charged at the regular rates of the Telegraph Company, and for such purpose the Telegraph Company would issue to such officers of the Railway Company as might be designated by the President, Vice President or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of said Railway beyond its lines should amount to more than twelve dollars ($12.00) per mile of railway per annum, the excess should be paid for at one-half the regular rates of the Telegraph Company. It was understood, however, that such telegraph service applied only to the transmission of messages concerning business of the Railway Company, and should not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company;

88 10. That it was further provided that the business of the Railway Company should have precedence over all other business upon the wires set apart for the use of the Railway Company and that the Railway Company should have the full use of all the wires then in operation and of two wires upon any extensions of said Railway that might thereafter be made, in case the Railway Company required the same, free of charge;

11. That it was further provided that in case the Railway Company should require the use of an additional wire or wires for railway business, over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company and in case an additional wire or wires should be required for commercial business, the same shall be paid for by the Telegraph Company, and, in either case, such additional wire or wires should come in under the agreement as to maintenance, repairs and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, should at any time be unfit for use, the Railway Company should have the free use of such of the wires set apart for commercial business as might be necessary to transact its business until the wires set apart to it should be put in fit condition for use;

12. That it was further provided that the provisions of said agreement should be and continue in force for ninety-nine years from the date thereof.

13. Your Petitioner further shows that under agreement dated the twenty-sixth day of December, 1903, by and between the Mason City and Fort Dodge Railway Company and your Petitioner, a con-

tract substantially similar to said last mentioned contract was entered into between said Railway Company and your Petitioner; to continue in force, however, for eighty-four years from the date thereof, so as to expire at about the same time that the original contract between the Chicago Great Western Railway Company and Petitioner
89 expires, which contract is attached and made part hereof as Exhibit "B."

14. Your Petitioner alleges that both said Railway Companies and your Petitioner have each faithfully performed their respective duties and obligations undertaken by each of them under said several contracts until the filing of the Bill of Complaint herein and the appointment of the said Receivers by this Honorable Court to take charge of and manage said Chicago Great Western Railway;

15. That subsequently to the appointment of said Receivers, the said Receivers elected to abide by and perform said contracts with your Petitioner, and have ever since their appointment as said Receiver-, adhered to and complied with the terms of said contracts, so far as the Chicago Great Western Railway was bound to comply with and perform said contracts and your Petitioner has likewise rendered the same services and duties to the Receivers that it was under said contract bound to render to and perform for the said Railway Company prior to the appointment of said Receivers and that, by such action, the Receivers have ratified and confirmed said contracts with your Petitioner and the same are now in full force and effect and binding upon said Receivers.

16. Your Petitioner further shows that, under Section Three (3) of said agreement of December 26, 1888, it is the duty of said Railway Company to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company when travelling upon the business of said Telegraph Company;

17. That by reason of a great sleet storm in the territory East of the City of Chicago, late in the month of February, 1909, a considerable portion of your Petitioner's telegraph wires and poles *were* broken and communication was interrupted between the East and the West; that in such instances which have occurred each year in the past your Petitioner and the Western Union Telegraph Company and the telephone companies find it necessary to draft every
90 available lineman from territory not affected by atmospheric disturbances to the place or places where there is a general breaking down or destruction of the telegraph lines, in order to reconstruct and repair such lines in the shortest possible time; that the necessity for such reconstruction is always imperative and that the linemen and supervising officers are required to and do work almost continuously until such repairs and reconstruction have been effected and communication has been re-established, your Petitioner averring that it is not uncommon for men to work twenty-four and thirty-six hours continuously in such labors; that the said breaking of your Petitioner's wires and lines was so extensive that linemen were immediately drafted from the territory west of Chicago, including linemen from Minneapolis and St. Paul into the territory East of Chicago,

and that upon the completion of said labors and restoration and reconstruction of the telegraph lines, said linemen were returned to their home stations.

18. That four (4) such telegraph linemen after restoration of the lines, and on March 1, returned to the City of Chicago for the purpose of returning to their homes at Minneapolis and St. Paul, and your Petitioner, in accordance with the terms of the contract between it and said Receivers, applied to said Receivers for free transportation for said four (4) linemen from Chicago to St. Paul; that said free transportation could not be obtained from the headquarters of said Receivers at St. Paul, Minnesota, and to save the time of said four (4) men, your Petitioner purchased tickets for said four (4) linemen over said Receivers' Railway from Chicago to St. Paul and paid therefor the regular rate of fare of eight dollars ($8.00) each, or thirty-two dollars ($32.00) for the total fares.

19. That subsequently thereto, your Petitioner applied to the said Receivers for a refund of said thirty-two dollars ($32.00)
91 so paid out by your Petitioner for the fares of said linemen, upon the ground that your Petitioner was entitled to free transportation for said linemen under Section Three (3) of your Petitioner's contract aforesaid;

20. That in reply to your Petitioner's demand said Receivers declined to refund to your Petitioner said sum of thirty-two dollars ($32.00), alleging as a reason for such refusal that the men in question were engaged on your Petitioner's lines East of Chicago; that they had not gone to Chicago for the purpose of doing any work on the Great Western Railway right of way, nor were they returning to St. Paul for the purpose of doing any work upon said right of way, wherefore said Receivers refused to refund said fares; said Receivers justified their refusal to refund upon the ground that the Interstate Commerce Commission had ruled that free transportation under the Hepburn Act could not be given to telegraph employees notwithstanding the existence of a contract between a railway company and a telegraph company requiring the railway company to issue to the telegraph company free transportation to its employees under circumstances and facts similar to those hereinbefore stated by your Petitioner.

21. Your Petitioner alleges that the terms of the contract between your Petitioner and said Great Western Railway Company as adopted by said Receivers, as hereinbefore set forth, requires the Receivers to issue to your Petitioner free transportation for its linemen and employees, whether said linemen are to be employed upon the right of way or are upon a journey with that purpose in view, or are to be employed or have been employed upon your Petitioner's telegraph lines upon other railways or highways than said Chicago Great Western Railway's right of way and that said contract does not, by its terms and was intended in spirit, to limit said free transporta-
92 tion of employees to those only who were to render or were rendering service upon or in connection with the telegraph lines of your petitioner upon the said Chicago Great Western Railway.

22. Your Petitioner alleges that under Section one (1) of the Act approved June 29, 1906, known as the Hepburn Act and intended to prevent discrimination by common carriers, railway companies are expressly authorized to issue free transportation to linemen of telegraph and telephone companies, and either the spirit of said Act nor the express words thereof indicate any intention to limit the carriers' right to issue such free transportation solely to such telegraph and telephone linemen as shall be or shall have been engaged in rendering service to the telegraph or telephone company upon the line of the railway company granting such free transportation.

23. Your Petitioner upon advice of Counsel alleges that, even if its claim to such free transportation shall be held not to be within the exceptions set forth in said Hepburn Act, yet its claim to free transportation of its employees is, under its said contract, protected by the Constitution of the United States, notwithstanding the terms of said Hepburn Act, and that said Act cannot rightfully be so construed as to impair the obligation of said contract and to discharge the Railway Company and its Receivers from obligations and duties resting upon them to the injury, prejudice and great money loss annually of your Petitioner during the life of said contract.

24. Your Petitioner therefore insists that it is entitled to a refund of said sum of thirty-two dollars ($32.00) and it prays that an order may be entered requiring said Receivers to answer this petition upon a short day to be fixed by the Court and that a hearing may be had upon any question of fact which may be raised by this petition
93 and said answer, and that, upon a hearing thereof, said Receivers may be directed and ordered by this Honorable Court to refund to your Petitioner the said sum of thirty-wo dollars ($32.00) so as aforesaid paid by it to said Receivers for the transportation of its linemen from Chicago to St. Paul as aforesaid.

And your Petitioner will ever pray, etc.

POSTAL TELEGRAPH-CABLE CO.,
Petitioner.

By T. W. CARROLL, *General Superintendent.*

LOESCH, SCOFIELD & LOESCH,
Solicitors for Petitioner.
FRANK J. LOESCH,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

T. W. Carroll, being first duly sworn, says that he is the General Manager of the Postal Telegraph-Cable Company, the petitioner in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true.

T. W. CARROLL.

Subscribed and sworn to before me this 14th day of May, A. D. 1909.

[SEAL.]

ANNA W. PORTER,
Notary Public.

94 EXHIBIT A.

This agreement made and entered into this 26th day of December, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively, witnesseth:

That whereas the Railway Company owns and operates a railway extending from the City of Chicago, Illinois, to Minneapolis, Minnesota, via Dubuque, Oelwein, Iowa, and St. Paul Minnesota, and from Oelwein via Marshalltown and Des Moines, Iowa, to St. Joseph, Missouri, with branches from Dubuque Junction to Lyle Minnesota, from Sumner to Hampton, and from Wilson Junction to Cedar Falls, Iowa, and contemplates extending its railway in the near future, by lease or otherwise, from St. Joseph to Kansas City, Mo., and whereas the railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole route of said railway as above described, together with the necessary batteries, machinery, and apparatus necessary for operating the same:

And whereas the Telegraph Company owns and operates lines of telegraph reaching the principal cities in the United States north of and including St. Louis, Cincinnati, and Washington City, and east of the Missouri River, and by its connections, the principal cities and towns in British America and on the Pacific Coast, and via the Commercial Cable Company to points in the Old World that are reached by telegraph and is engaged in extending its lines into the Southern States and is desirous of including within its system the lines of telegraph of the said Railway Company.

Now therefore for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:—

95 1. The Railway Company agrees that the Telegraph Company may take charge of the telegraph lines and property of the Railway Company as hereinbefore described, on the first day of January, 1889, and that, so far as it legally may, it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line, lands and branches of the Railway Company, and on any extensions and branches thereof, for the construction and use of lines of poles and wires, and underground or other lines for commercial and public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound so to do, transport men or materials for the construction or operation of a line of poles or wires

or underground, or other lines in competition with the lines of the Telegraph Company, party hereto, except at and for the Railway Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided always, that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its rail-

96 way stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway.

97 IV. The Telegraph Company agrees to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials neces-

sary for the maintenance and repair of said lines, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now, or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees to pay to the Railway Company the sum of Eighty-seven thousand dollars ($87,000) in three equal payments of Twenty-nine thousand dollars, ($29,000) on the first of July, 1889, the first of January, and the first of July, 1890, respectively, for which sums it will give its promissory notes, with interest at the rate of five per cent per annum, upon the execution of this agreement.

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of $10 per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of
98 the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accom-odations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the same free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires, the commercial business

of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the terms of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, shall be at any time unfit for use the Railway Company shall have the free use of such of the wires
99 set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

IX. It is mutually understood and agreed, that the Railway Company is not to be responsible for, and the Telegraph Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damages that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company, nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said Railway; and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from or on account of any error, delay, or default in the transmission or delivery of any message sent for the Railway Company under this agreement.

X. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries, and blank forms and stationery for local business, as hereinbefore provided.

XI. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far
100 as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XII. The provisions of this agreement, shall be and continue in force for ninety-nine years from the date hereof, and in case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties

hereto, and the third by the two thus chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In witness whereof the parties hereto have caused the names of their respective Presidents to be hereto subscribed and their corporate seals to be attested, the day and year first above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,
By A. B. STICKNEY, *President.*

Attest:
JOHN I. THOMPSON,
Assistant Secretary.

POSTAL TELEGRAPH-CABLE COMPANY,
By A. B. CHANDLER, *President.*

Attest:
J. O. STEVENS,
Ass't Secretary.

101 Memorandum of Agreement, made this fifth day of February, 1902, by and between the Chicago Great Western Railway, a corporation duly organized and existing under the laws of the State of — and the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York:

It is mutually agreed that the seventh clause (VII) of the agreement made and entered into December 26th, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, and the said Postal Telegraph-Cable Company (the Chicago Great Western Railway Company as successor of the Chicago, St. Paul and Kansas City Railway Company having assumed said agreement), shall be and the same hereby is cancelled and the following clause substituted therefor, in effect from this date:

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates, to the final destination, all such railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company originating at or destined to points on the Telegraph Company's line, within the United States, either upon or off the line of said railway; and in case

the telegraph business of the Railway Company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accom-odations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

In witness whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

[CORPORATE SEAL. T. L.]

CHICAGO GREAT WESTERN RAILWAY,
By SAM STICKNEY, *Gen. Manager.*

Attest:
R. C. WIGHT, *Sec'y.*

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER, *Vice-President.*

Attest:
CHAS. P. BRUCH,
Ass't Secretary.

102 (Copy.)

EXHIBIT B.

This agreement, made and entered into this 26th day of December, 1903, by and between the Mason City & Fort Dodge Railway Company, a corporation organized under the laws of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively, witnesseth:

That whereas, The Railway Company owns and operates a railway extending from the City of Oelwein, Iowa, to Waverly, Iowa, and

Whereas, The Railway Company is desirous of obtaining the use of a line of telegraph covering the whole route of said railway as above described together with the batteries, machinery and apparatus necessary for operating the same and to that end permitted the Telegraph Company to enter upon the premises of the Railway Company for the purpose of constructing said line of telegraph which has been already partially constructed,

Now therefore, for and in consideration of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company

may construct so far as the same is not already constructed, a telegraph line upon the property of the Railway Company as hereinbefore described to be completed ready for use on the first day of January, 1904, and that so far as it legally may it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line and lands of the Railway hereinbefore described, and on any extensions and branches thereof for the construction and use of lines of poles and wires, and underground or other lines for Commercial and Public uses or business, with the right to put up and construct from time to time such additional
103 wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound to do so transport men or materials for the construction or operation of a line of poles or wires or underground, or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railway Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided, always that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expense incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may be hereafter owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that
104 the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires

of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employes of the Telegraph Company when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway as above described all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of the agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to construct so far as the same is not already constructed a substantial telegraph line, with at least two wires, which shall be for the exclusive use of the Railway company if the business of the Railway Company requires it, and complete it ready for use upon and along the property of the Railway Company on or before the first day of January, 1904, and thereafter to furnish all materials necessary for the maintenance and repair of said line, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees during the continuance of this contract to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company (and of the Chicago Great Western Railway Company so long as the said Chicago Great Western Railway Company operates and controls the said line of railway along which said telegraph line is to be completed as aforesaid) to the extent of twelve ($12.00) Dollars per annum per mile of railway as above described, including any extensions that may hereafter be made and brought under the operation of this contract, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates to the final destination, all such Railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company, or of the Chicago Great Western Railway Company, as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such transmission of messages

relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the lines of said railway; and in case the telegraph business of the Railway Company (or of the Chicago Great Western Railway Company as aforesaid) beyond its lines shall amount to more than twelve
106 ($12.00) (*$12.00*) Dollars per mile of railway per annum the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed however, that the Telegraph Service herein provided for is to be in addition to like service to which either company may be entitled to under other contracts with the Telegraph Company and it applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car or steamer berths or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of two wires upon all the railway covered by this agreement and any extensions thereof in case the Railway Company require- the same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires the commercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned the same shall be paid for by the Railway Company and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come under the terms of this contract as to maintenance, repairs and renewals. In case the two wires or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

VIII. It is mutually understood and agreed that the Rail-
107 way Company is not to be responsible for, and the Telegraph Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damage that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company;

nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said railway, and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from, or on account of any error, delay or default in the transmission or delivery of any messages sent for the Railway Company under this agreement.

IX. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments local batteries and blank forms and stationery for local business as hereinbefore provided.

X. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XI. The provisions of this agreement shall be and continue in force for eighty-four (84) years from the date hereof, and in
108 case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and the third by the two chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In witness whereof, the parties hereto have caused the names of their respective presidents to be hereto subscribed and their corporate seals to be attested the day and year first above written.

MASON CITY & FORT DODGE RAILWAY COMPANY,
By R. C. WIGHT, *Vice-President.*

Attest:
CHAS. A. TALMAN,
Ass't Secretary.

Form approved:
A. G. BRIGGS,
General Attorney.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER, *Vice-Pres. & Gen'l Mgr.*

Attest:
CHAS. P. BRUCH,
Ass't Secretary.

Approved for execution:

——— ———,
General Manager.

(Endorsed:) Filed May 20, 1909. H. S. Stoddard, Clerk.

109 And afterwards to-wit: on the eig-th day of June, 1909, came the receivers in said entitled cause by their solicitors, and filed in the clerk's office of said court, their certain demurrer to the intervening petition of the Postal Telegraph-Cable Company. Said demurrer is in words and figures following to-wit:

Demurrer.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Demurrer of Charles H. F. Smith and Horace G. Burt, to Petition of Intervention of Postal Telegraph Company.

To the Honorable Judges of said Court, in Chancery Sitting:

Charles H. F. Smith and Horace G. Burt, as Receivers of the Chicago Great Western Railway, by protestation, not confessing or acknowledging all or any of the matters or things in the petition of intervention of the Postal Telegraph Cable Company contained to be true, in such manner and form as the same are therein set forth and alleged demur to said bill, and for cause of demurrer show:

110 1. That said petitioner, Postal Telegraph Cable Company, in and by said petition made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioner's own showing by said petition, that it is not entitled to such relief.

2. That said petition of the said petitioner, the Postal Telegraph Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these receivers for the transportation of certain employes of petitioner over the line of railway operated by these receivers, which said sums petitioner was legally bound to pay, and which these receivers might not legally refund to petitioner.

Wherefore, and for divers other good causes of demurrer appearing in said petition, said receivers demur thereto and pray judgment of this Honorable Court, whether they should be compelled to make further or any answer to said bill, and they pray

further to be hence dismissed with their reasonable costs in their behalf sustained.

GARDNER, STERN & ANDERSON AND
H. LOOMIS,
Solicitors for Receivers.

A. G. BRIGGS,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion well founded in point of law.

Dated this 7th day of June, 1909.

A. G. BRIGGS,
Of Counsel for Receivers.

111 STATE OF MINNESOTA,
County of Ramsey, ss:

Charles H. F. Smith makes solem oath and says that he is one of the receivers of the Chicago Great Western Railway Company, against whom judgment is sought to be obtained by the petition of intervention of the Postal Telegraph Company; that the foregoing demurrer is not interposed for the purpose of delay, and that the same is true in point of fact.

CHAS. H. F. SMITH.

Subscribed and sworn to before me this 7th day of June, 1909.

[SEAL.] G. F. PHILLEO,
Notary Public, Ramsey County, Minnesota.

My Commission expires Nov. 18, 1909.

(Endorsed:) Filed June 8, 1909. H. S. Stoddard, Clerk.

112 And afterwards to-wit: on the sixteenth day of March, 1910 came the Special Master and filed in the clerk's office of said Court his report on the Intervening Petition of the Postal Telegraph-Cable Company. Said report is in words and figures following to-wit:

113 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Notice is hereby given that I have drafted my report upon the intervening petition of the Postal Telegraph-Cable Company. A copy of said draft is hereto attached.

Notice is further given that I will hear any objections that you

may have to my said report as so drafted at the office of the Clerk of the Circuit Court of the United States, in the city of Chicago, Illinois, on the 16th day of March 1910, at 10 o'clock in the forenoon, and at the said place and time I will settle my said report and you are then and there required to file any exceptions which you may have to my said report as so settled. Under existing orders exceptions not so filed at said time will not be considered by the Court.

A. R. MOORE,
Special Master.

Dated, St. Paul, Minn., March 4th, 1910.

To Messrs. Loesch, Scofield & Loesch, Attorneys for the Postal Teleg.-Cable Co., Petitioner, The Temple, Chicago, Ill.

To Messrs. Winston, Payne, Strawn & Shaw, Attorneys for the Receivers and the C. G. W. R. R. Co., First Nat'l Bank Building, Chicago, Ill.

114 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

To the Honorable Judges of the Circuit Court Above Named, in Chancery Sitting:

In re Intervening Petition of the Postal Telegraph-Cable Company.

The petition of the Postal Telegraph-Cable Company above referred to was filed in the office of the Clerk of the above entitled Court on the 20th day of May 1909, and was thereafter transmitted by said clerk to me for my consideration, pursuant to an order made and entered in the above proceedings by the terms of which all intervening petitions filed in this cause by which the intervener seeks to recover any money or any property from the Receivers, were referred to me for my investigation and report.

Thereafter and on or about the 8th day of June 1909, the Receivers filed their demurrer to said intervening petition and assigned as the grounds thereof—

1. That said petitioner, Postal Telegraph-Cable Company, in and by said petition has not made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioner's own showing by said petition, that it is not entitled to such relief.

115 2. That said petition of the said petitioner, the Postal Telegraph-Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Re-

ceivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay, and which these Receivers might not legally refund to petitioner.

By agreement of Counsel said demurrer was set down for hearing before me on Tuesday, the 28th day of September 1909, at 10 o'clock A. M. at the office of the clerk of the above entitled Court. At said time and place Frank J. Loesch, Esq., appeared as Solicitor for the petitioner and Mr. F. S. Winston, as Solicitor for the Receivers and the C. G. W. R. R. Co. Mr. P. J. Farrell, Solicitor for the Interstate Commerce Commission appeared as amicus curiæ.

The questions raised by said demurrer were fully argued by Counsel and briefs were submitted with reference thereto. After due consideration thereof, I respectfully report that said demurrer is well founded in point of law and should be sustained by the Court. I therefore respectfully recommend that an order be entered to that effect and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition.

All of which is respectfully submitted.

Settled as per attached Notice and Dated, this March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

116 And on the same day to-wit: the sixteenth day of March, 1910, there was filed in the Clerk's office of said Court in said entitled cause certain Objections to Special Master's Report in words and figures following to-wit:

117 *Objections to Special Master's Report.*

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

In re Intervening Petition of the Postal Telegraph-Cable Company.

Objections to Special Master's Report.

Objections taken by the above named intervening petitioner to the report of A. R. Moore, the special master in chancery to whom this cause stands referred for investigation and report on the intervening petition of Postal Telegraph Cable Company.

First. For that the said Special Master has found and reports that

the demurrer filed to said intervening petition is well founded in point of law and should be sustained by the Court; whereas the said Special Master should have found and reported that said demurrer to said intervening petition is not well founded in point of law and should be overruled by the Court.

Second. For that the said Special Master has recommended that an order be entered sustaining said demurrer and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition; whereas the said Special Master should have recommended that an order be entered overruling said demurrer and requiring said receivers
118 to plead to or answer said intervening petition within a short day to be fixed by the terms of said order.

Third. For that the said Special Master should have found that the petitioner, Postal Telegraph-Cable Company by its petition has stated a cause of action which entitles it to the relief as therein prayed for.

In all of which particulars the said Intervening petitioner objects to the said report, and submits that the same ought to be altered and varied.

WILLIAM E. O'NEILL,
Solicitor for Postal Telegraph-Cable Company, Intervening Petitioner.

The foregoing Objections are each overruled and my report settled as originally drafted.

Dated March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

[Endorsed:] Circuit Court of United States, Northern District of Ill., Eastern Division. John A. Humbird et al., Complainants, vs. Chicago Great Western Railway Company, Defendant. Re Intervening Petition of Postal Telegraph Cable Company. Objections to Special Master's Report. William E. O'Neill, Attorney for Intervening Petitioner.

119 And afterwards to-wit: on the fourth day of April, 1910, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

This cause having come on to be heard upon the written stipulation of the parties hereto by their respective attorneys, and the court

being fully advised in the premises, it is hereby ordered that the objections heretofore filed by Postal Telegraph-Cable Company to the report of the Special Master in Chancery, stand as exceptions to such report, before the Court, and that the hearing on said exceptions be, and the same is hereby set for the fourth (4th) day of May, A. D. 1910, at the hour of ten (10) o'clock A. M.

120 And on to-wit: the fourth day of May, 1910, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Now come the parties by their solicitors and now comes on to be heard the exceptions of the Postal Telegraph Cable Company to the Special Master's Report, heretofore filed herein; and the Court, having heard the arguments of counsel to conclusion, overrules said exceptions; and thereupon it is ordered that the said Master's report be, and the same is, hereby approved. And thereupon the demurrer of the receiver to the petition of said Postal Telegraph Cable Company is heard and sustained; and it is further ordered that the said petition be, and the same is, hereby dismissed at the petitioner's costs.

And thereupon the said petitioner enters its motion for an appeal to the Supreme Court of the United States.

121 & 122 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing ~~4~~ to be true and complete copies of the certain Order entered of record in the Circuit Court of the United States for the Northern District of Illinois, on the twenty-third day of January, 1908, appointing Special Master in Chancery, Intervening Petition of the Postal Telegraph-Cable Company, filed May twentieth, 1909, Demurrer of Receivers, filed June eighth, 1909, Special Master's Report, filed March 16, 1910, Objections filed to Special Master's Report, March sixteenth, 1910, Order entered of record April fourth, 1910, and Order entered of record May fourth, 1910, in the cause entitled, John A. Humbird, et al., Complainants, vs. Chicago Great Western Railway Company, Defendant, as the same appear from the original Records and Files thereof, now remaining in my custody and control. In Testimony Whereof, I have hereunto set my hand and

affixed the seal of said Court, at my office, in the City of Chicago, in said District, this twenty-fourth day of April, 1916.

[Seal Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MacMILLAN, *Clerk.*

123 [Endorsed:] P. Ex. 5. June 21, '16.

124 PLAINTIFF'S EXHIBIT No. 6.

In the District Court of the United States for the District of Maryland.

No. 56. Equity Docket "F."

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

Docket Entries.

Aug.	1, 1908.	Bill of Complaint and Exhibit "A," filed.
"	" "	Præcipe for Subpœna, filed.
"	" "	Subpœna issued ret'ble first Monday of September next.
		(Summoned the Baltimore and Ohio Railroad Company, by service on Hugh L. Bond, its 2nd Vice President, and copy Subpœna in Equity left with him August 3, 1908.)
Oct.	7, "	Answer filed.
"	16, "	Complainant's motion to set this cause for argument on bill and answer filed. (Notice admitted.)
Dec.	16, "	Petition of Complainant and Defendant for an order of Court requiring notice of the pendency of this case and a statement of the issues involved to be served upon the Interstate Commerce Commission with leave to said Commission to be represented upon the hearing by counsel who shall appear as a friend of the Court, filed.
"	21, "	Order of Court on foregoing petition granting same, filed.
Mch.	3, 1909.	Brief by the Interstate Commerce Commission, filed.
Apr.	14, "	Replication filed.
Apr.	14, "	5 Copies Brief and Argument of Complainant, filed.
"	" "	5 Copies Reply Brief of Complainant, filed.
June	22, 1910.	Decree of Court that the Complainant have leave to withdraw its suit without prejudice, the complainant to pay all costs, filed.

125 & 126 UNITED STATES OF AMERICA,
District of Maryland, To-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the Docket Entries, taken and copied from the record of proceedings in the therein entitled case of Western Union Telegraph Company, a corporation, vs. Baltimore and Ohio Railroad Company, a corporation, No. 56 Equity Docket "F," in said District Court, transferred from the Circuit Court of the United States for the District of Maryland by Act of Congress, approved March 4th, 1911.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 8th day of June, 1916.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled 6, 18, '16. A. L. S.]

127 In the United States Circuit Court for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bill of Complaint.

Henry D. Estabrook, Solicitor for Complainant.
John F. Dillon, Rush Taggart, George H. Fearons, of Counsel.

128 In the United States Circuit Court for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bill of Complaint in Equity.

To the Honorable the Judges of the Circuit Court in and for the Fourth Judicial Circuit and District of Maryland at Baltimore:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York and a citizen and resident of said State, having its principal place of business in the State of New York and in the Southern District thereof, brings this its bill of complaint against the Baltimore and Ohio Railroad Com-

pany, a corporation organized under the laws of the State of Maryland, and a citizen and resident of said State, and having its principal place of business in the City of Baltimore, State of Maryland, and says:

1. That this case is one wholly between citizens of different states and that the subject-matter thereof and the amount in con-
129 troversy is of the value of more than two thousand dollars exclusive of the interest and costs, and is also one arising under the Constitution and laws of the United States.

2. That your orator, the Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existing under an Act of the Legislature of the State of New York entitled "An Act to provide for the incorporating and regulating of telegraph companies," passed on the 12th day of April, 1848.

3. That the Baltimore and Ohio Railroad Company is a corporation organized and existing under the laws of the State of Maryland, and owns, controls and operates the following lines of Railway:

From Philadelphia, Pennsylvania, to Baltimore, Maryland; from Baltimore, Maryland, to Washington, District of Columbia; from Baltimore, Maryland, westward through the states of Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois, and reaching, among others, the cities of Pittsburg, Wheeling, Cleveland, Columbus, Cincinnati and Chicago.

4. That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of Telegraph lines in the State of New York and other states, and has continuously, since that time, been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extends through all the states and territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American Republics and by means of submarine cables with the telegraph systems of foreign countries; that at the present time its
130 system of telegraph lines operated and controlled by it, as aforesaid, comprises over 200,000 miles of poles and cables, and over 1,000,000 miles of wire; that upon the said system of telegraph lines your orator has nearly 25,000 offices (about 20,000 of said offices being railroad offices yielding revenues too small to pay for separate maintenance), and transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns

and villages in the United States and in North America and through the ocean cables and land lines above described to all the important commercial centres of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important part of said system of your orator and connected with its main office as aforesaid in the City of New York and connecting with other lines of telegraph leading to the important commercial centres of the South, the West and Southwest, are lines of telegraph over and along the said Baltimore and Ohio Railroad and along the branches thereof, connecting with lines reaching to the Pacific Ocean and to the South, West and Southwest, and through those lines to Mexico, Central and South American countries and through the Pacific Ocean cables to China, Philippine Islands and Japan.

5. Your orator avers that on, to wit, the 15th day of October, A. D. 1887, it entered into a certain written contract with the
131 said Baltimore and Ohio Railroad Company, contracting therein for itself and for all the railroads and railway companies whose lines of railroad were then owned, leased or controlled by the said Baltimore and Ohio Railroad Company, or which were thereafter to be owned, leased or controlled by said Railroad Company through ownership of stock or otherwise during the continuance of said agreement, a copy of which said contract is hereto attached, marked "Exhibit A" and made part of this bill of complaint.

6. By the terms of said contract the said Telegraph Company, your orator, agreed to construct, maintain, repair and reconstruct various telegraph lines for the mutual use of said Telegraph Company and said Railroad Company according to the terms set forth in said agreement; further agreeing to change from time to time the location of any of the wires, poles or cables upon the right of way or property of said Railroad Company in such manner as the proper officers of the Railroad Company might direct so as not to interfere with the operations of said railroad, or to place the wires in underground conduits in cities and towns along said railroad, wherever necessary, in accordance with the terms of said contract. Said Telegraph Company further agreed to furnish to said Railroad Company, free of cost, the use of its main batteries for the efficient operation of all railroad wires, and also all instruments, local batteries, stationery and other material for commercial business, granting to said Railroad Company for use upon the railroad wires all telegraphic patents which the Telegraph Company or its subordinate companies now or hereafter might own, as provided in said contract; agreeing also that in addition to exclusive wires for railroad operations, said Railroad Company should have the joint use of the wires of the Telegraph Company for important railroad messages directing the movement of trains, such messages having precedence as provided in said contract; and said Telegraph Company further agreed
with said Railroad Company that it would receive and
132 transmit over its said lines along said railroad, in the order in which they and other messages might be filed with it, and

would deliver with promptness and despatch and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all cities, towns and places now reached by said telegraph lines on said railroads; expressly agreeing that all such messages should be received at and delivered from any of the offices of the Telegraph Company or its subordinate companies in any of the said cities, towns and places, and when so received should be transmitted by the Telegraph Company over said telegraph lines free of charge; and that if for any reason or convenience to the Telegraph Company any of said messages should be transmitted by other lines to the place of destination no charge should be made therefor. Said Telegraph Company further agreed with the said Railroad Company to issue to such officers of the Railroad Company as might be designated by the president or other authorized officer thereof annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines then owned or thereafter owned or operated by the Telegraph Company, or its subordinate companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding $10,000 per annum calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages should originate and the points to which they might be destined; and the said Railroad Company agreed in said contract to pay the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount of $10,000 per annum, settlement to be made yearly. It was further understood and agreed between the parties to this suit that the free telegraphic service provided for in said contract should apply only to the transmis-
133 sion of messages concerning the operation and business of the Railroad Company's railroads covered by said agreement and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should be properly chargeable to such customers. And said Telegraph Company further agreed to pay to the said Railroad Company the sum of $60,000 per annum in equal instalments of $5,000 at the close of each month during the continuance of said agreement, accounting therefor from October 15th, 1887.

7. That at all times since the making of the said contract hereinbefore set forth as Exhibit A, your orator has observed, kept and performed all the obligations and requirements of the said contract on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money in furnishing facilities to the said defendant railway company and the use of valuable patents, batteries and instruments, the said expenditures by your orator under said contract Exhibit A amounting in the aggregate to many hundred thousand dollars, and the said defendant herein, the Baltimore and Ohio Railroad Company, has at all times availed itself of the facilities thus afforded by

your orator without complaint on its part that your orator was in any respect delinquent in failing to render to the said Baltimore and Ohio Railroad Company all the service and benefits that it was entitled to receive and enjoy under each and every of the provisions of the said contract.

8. And the said defendant Railroad Company on its part agreed in said contract to transport free of charge over its said railroads, on application of the superintendent or other proper officer of the Telegraph Company, all employees of said Telegraph Company when traveling on the business of said Company or engaged in its work along said railroads and likewise to transport and distribute,
131 free of charge, all poles and other materials and supplies of the Telegraph Company for the construction, maintenance, renewal and reconstruction of said telegraph lines named in said contract along said railroads, and of such additional wires as from time to time might be erected on said telegraph lines, and for other lines and wires in said contract provided for, on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance and operation of the telegraph offices of both parties to said contract at places along said railroads. And the said defendant Railroad Company also agreed to transport, free of charge, employees of the Telegraph Company when traveling on its business or engaged in its work, and the poles and other materials and supplies of the Telegraph Company required for the construction, maintenance, renewal and reconstruction of other telegraph lines of the Telegraph Company than those enumerated in said contract, whether such lines should be on or off the line of said railroads, to the amount not exceeding $10,000 per annum, calculated at the current transportation rates of the Railroad Company; and the said Telegraph Company agreed in said contract to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount of $10,000 per annum, settlements to be made yearly.

9. And said agreement contained other covenants on the part of both said telegraph and railroad companies for the mutual maintenance, operation and control of said telegraph lines, all of which are set forth in the written contract hereto attached as Exhibit A, but which your orator is advised it is unnecessary to set forth with greater particularity in this its bill of complaint.

10. Your orator further avers that said contract was continuously and in good faith observed and performed by the parties
131½ thereto until October 1st, 1906, when your orator was informed by the defendant that because of the enactment by Congress of the act entitled "An Act to regulate commerce," approved February 4th, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission, it would not further perform said contract so far as furnishing interstate transportation for employees and material in connection with the construction, maintenance and operation of telegraph lines off the lines of its said railroad, and that it would thenceforth demand and exact of your orator the usual and

full rates of carriage on all materials and supplies for repairs, improvements, renewals or extensions of said telegraph lines consigned to points off the line of defendant's railroad, and would demand and exact of your orator the usual full passenger and freight rates for carriage over said lines of railroad for such of the employees of the complainant and material of the complainant as were traveling to points off the line of said defendant's railroad, albeit that such interstate shipments and transportation were in the interest of your orator's business and the maintenance, inspection and operation of said telegraph lines and included in and covered by said contract; and that for all such interstate transportation during the whole of the contract year 1906-7 said defendant Railroad Company did demand, and still continues to demand, of your orator payment in money at the usual and full passenger and freight rates of said Railroad Company. And the defendant then and ever since has asserted and now asserts that the performance of the obligations assumed by and imposed upon it in and by said contract in this respect is within the prohibition of said Hepburn Act save upon payment therefor in money at the usual and full rates, and that said statute of Congress applied not only to contracts between railroad and telegraph companies for the mutual exchange of services but in effect, and to the extent indicated, annulled the contract existing between your orator and this defendant, and that in these particulars the
134¾ contract should be and by the defendant was considered
as annulled and that the defendant would not longer observe nor further perform it although insisting upon the full performance thereof by your orator in all the obligations assumed by it.

11. Your orator avers that the defendant has misconstrued the purpose and the intention of the said Act of Congress hereinbefore named, and that said Act and the Act to which the said Act is an amendment does not justify the defendant in violating its contract with your orator; that the purpose of said Act and of the Act of which the same is amendatory, is to prohibit and prevent discriminations by common carriers in favor of one shipper or passenger as against other shippers and passengers in like case, and that all inhibitions and prohibitions of said Act are directed to the securing of equality of service by common carriers of customers of such common carriers, whether they are shippers of goods or passengers. But your orator protests that the relation of shipper and carrier was not created by the contract, "Exhibit A," hereinbefore set forth, nor by the terms of said contract was or is the defendant obliged to omit or forego any duty imposed upon it by law, that, as will hereafter fully and clearly be set forth, a joint relation in the construction, maintenance and operation of telegraph lines and property was created by said contract, the said telegraph lines being an indispensable instrumentality for the performance by each of the parties to said contract of the obligations assumed by it in the transactions of its business.

12. Your orator further avers that under the said Contract, "Exhibit A," it has not furnished any free service to the defendant, nor has the defendant furnished any free service

to it in the sense of gratuitous service. That at the time of entering into said contract the value of the services which were to be furnished to your orator by the defendant,
135 including office rents in its stations, hauling of material and supplies, operators to transact the business, transportation for the officers and employes of your orator, and other matters mentioned in said contract were estimated and determined to be equal with other considerations moving from your orator to said defendant under said contract; and your orator avers that whatever service is rendered by either party to said contract to the other, whether in the transportation of freight or passengers or in the transmission of messages, is fully compensated by the service contracted to be rendered by the other party thereto.

13. And your orator avers and makes known to this Honorable Court that one of the first uses of the telegraph after its invention was in connection with the operation of railroads, enabling railway trains to be safely run without danger of collision, and that to the present time railroad companies require telegraph lines for their successful and safe operation; that such lines are required not only along their own lines of railroad but to reach points upon other lines of railroad and hence it is that the construction and operation jointly of telegraph lines by railroad companies and telegraph companies has come to be recognized as a necessity in order that each may best discharge its duties to the general public. And your orator avers that it has contracts with very many railroad companies throughout the United States of similar import to the contract here in controversy, and that in the past whenever any such contract has expired by limitation such contract has almost without exception been renewed or the parties thereto have sought to renew it upon terms mutually advantageous and agreeable to meet changed conditions, the outgrowth of mutual development; that it has been the custom of railroads since the adoption of a standard track gauge to send their freight cars to final destination without unloading over the tracks of other companies, so that as modern railroad operations are conducted the cars belonging to one railroad company are
136 scattered along the tracks of nearly every other railroad company in the United States from the Atlantic Ocean to the Pacific Ocean and from Canada to the Gulf of Mexico; that it is not merely desirable but absolutely necessary that the whereabouts of a particular car of freight should be known to a railroad company at all times, and your orator avers that the only means of obtaining such knowledge is through the instrumentalities of the telegraph; and because of this and other like necessities of said railroad companies there has grown up what is known as the free service in telegraph contracts; that is, the right to transmit messages over the lines of a telegraph company not upon the line of the particular railroad companies contracting with it, and in this particular each railroad company contracting with your orator is interested not only in the construction, maintenance and operation of the telegraph lines upon its own line of railroad but in the construction, maintenance and operation of the other telegraph lines belonging to your orator.

But your orator avers that none of said service is free but the same is fully compensated for by the other considerations in said contract, and the same is true with respect to the so-called "free" transportation of employees and materials also stipulated for in said contract. And your orator further avers that the use of the telegraph has become a necessity to the traveling public, so that whether or not a railroad company would be under any legal obligation to supply telegraphic facilities to its patrons it would be regarded by the public as most unusual for such facilities to be withheld. And hence it is, may it please this honorable Court, that railroad companies enter into contracts with telegraph companies to furnish telegraphic facilities both for the conduct of railroad operations and for the accommodation of the general public. And your orator avers that in negotiating such contracts railroad and telegraph companies have met, each endeavoring to secure the maximum of facilities for itself and the general public for the least expenditure of money and material, and that it frequently requires months and years of ne-
137 gotiation to reach a final agreement, and that such mutual advantages as the consummated contract gives to the railroad and telegraph companies find expression in lower railroad and telegraphic rates to the general public. And your orator avers that it would be neither expedient nor possible for a railroad or a telegraph company to enter into a contract for the joint construction, maintenance and operation of telegraph lines except such contract was made for a definite period of years. Particularly is this true concerning the telegraph company inasmuch as such contracts involve the erection of telegraph poles along the right of way belonging to the railroad company, and the stringing of numerous wires thereon, thereby incurring an enormous expense that only definite compensation for a definite period would justify.

14. Your orator further says that it stands ready, and is able and willing, and hereby tenders performance and continued performance of each and every provision of the said contract, Exhibit A, to the said defendant company, and of all the conditions and obligations imposed upon your orator by the said contract, and avers that upon such performance on its part it is entitled to require from the defendant company the performance on its part of all the provisions of the said contract.

15. Your orator further avers that if it be mistaken with reference to the correct construction of the said Act of Congress, and if it should be held that it was the intention of Congress to have said statute apply to contracts, such as that between your orator and the defendant, and if it further be held that it was the intention of Congress that said law should be construed so as to make the terms of the existing contract between your orator and the defendant unlawful, then your orator says that, in so far as it attempts to affect the operation of said contract, said act is in violation of the
138 Constitution of the United States and void. But your orator avers in this connection that said contract existing between it and the defendant is a valid, subsisting and existing contract, not in violation of any law of the United States now or when entered

into, not contrary to any public policy, and that it is a valuable property right of which your orator cannot be deprived by any arbitrary exercise of the law-making power, nor in any other manner except by due process of law.

16. Your orator further avers that it has no adequate remedy at law, and that it could not be compensated in damages for the loss which it will sustain by reason of the defendant's attempted breach of said contract; that it has been for many years engaged in building up a business organization through its connection with the various railway lines of the country, the value of which cannot be estimated in money, but would run into the millions of dollars; that to have its said business relations with the defendant and other railway lines arbitrarily destroyed would be in effect to deprive your orator of large property values without due process of law, and to deny to it the equal protection of the law. Your orator further avers that the liberty guaranteed to it by Section 1, Article XIV, of the Constitution of the United States, is the liberty of contract as well as freedom from personal restraint, and that, therefore, if it was the intention of Congress to deprive your orator of the right to make a reasonable contract with a railway company for the interchange of service the said law is in conflict with said Fourteenth Amendment to the Constitution of the United States and void. Your orator further avers that the refusal of the defendant to specifically perform said contract will impose upon your orator the necessity and burden of a great multiplicity of suits for the protection of its rights, in that such refusal will oblige your orator to pay in money for services rendered by the defendant for which, by the said contract, your orator has already rendered full consideration and satisfaction, and compel your orator
139 to sue the defendant for the sum of each such payment, or aggregate of payments, from time to time during the whole term of said contract. That it is impossible to estimate or place a money value upon the damages which your orator will sustain by reason of the defendant's breach of its contract with your orator, nor will it be possible for your orator to sever its business relations with the defendant, annul said contract in entirety and take over the exclusive operation of its telegraph line, independent of any connection whatever with the defendant, without a great loss, which could not be compensated for in damages, and that the effect of the annulment of said contract would be to disrupt and disorganize the entire telegraph system of your orator. Your orator further avers that the defendant's breach of said contract is a continuous breach, and exists from day to day, and that your orator has no adequate remedy at law for the injury thus being inflicted upon it, and in order for it to secure adequate relief it is not only necessary that the defendant be enjoined from any further breach of said contract, but that it be required to continue to observe its said contract between itself and your orator.

Forasmuch, therefore, as your orator can have no adequate relief except in this Court, and to the end that the defendant the Baltimore and Ohio Railroad Company may, if it can, show why your

orator should not have the relief hereby prayed, make full disclosure and discovery of all the matters aforesaid, according to the best of its knowledge and belief, and full, true and perfect answer make to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, your orator prays that the Court will determine, adjudge and decree that the said contract Exhibit A is still in full force and effect notwithstanding the action of the defendant with respect thereto, and that the Court order, adjudge and decree that the said defendant, the Baltimore and Ohio Railroad Company may be required specifically to perform the said contract Exhibit A, your orator being ready and willing, and hereby offering, specifically to perform said
140 agreement in all things on its part and behalf; and that this Court will further order, adjudge and decree that your orator is entitled to a perpetual injunction herein against the defendant the Baltimore and Ohio Railroad Company restraining it from in any manner violating any of the provisions of the said contract Exhibit A which this Court shall require the said defendant the Baltimore and Ohio Railroad Company specifically to perform on its part, and meanwhile and until the final decree of this Court that a temporary injunction be issued against the defendant prohibiting and restraining it from in any manner violating any of the provisions of said contract Exhibit A, and for such other and further relief as the case may require and to your Honors may seem just. May it please your Honors to grant unto your orators the writ of subpœna of the United States of America to be directed to the defendant the Baltimore and Ohio Railway Company, commanding it, by a certain day, and under a certain penalty, to be and appear before your Honors in this Honorable Court, then and there to answer all and singular the premises and to stand, abide and perform such order and decree therein as to your Honors shall seem agreeable to equity and good conscience.

This bill of complaint is filed under the corporate authority and corporate seal of the complainant.

——— ———, *President.*

Attest:

——— ———, *Secretary.*

HENRY D. ESTABROOK, *Solicitor.*

JOHN F. DILLON,
RUSH TAGGART,
GEORGE H. FEARONS,
Of Counsel.

141 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert C. Clowry, being duly sworn, says he is President of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he

has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

——— ———.

Sworn to before me this — day of ———, 1908.

——— ———.

142 EXHIBIT A.

This agreement made this 15th day of October, 1887, by and between the Western Union Telegraph Company, hereinafter called the "Telegraph Company," party of the first part, and the Baltimore and Ohio Railroad Company, hereinafter called the "Railroad Company," party of the second part,

Witnesseth:

Whereas an agreement of date October 5th, 1887, was made between the Telegraph Company and the Railroad Company, under which the Telegraph Company acquired from the Railroad Company certain Telegraph property, rights and interests, and by the terms of which it was agreed that an operating contract should be made between the Railroad Company and the Telegraph Company, covering the telegraph lines on the railroads owned, operated or controlled by the Railroad Company.

Now therefore in order to carry out the said provisions for the execution of an operating contract, it is mutually agreed between the parties hereto as follows:

First. The railroads now owned, operated or controlled by the Baltimore & Ohio Railroad Company, and referred to herein, are shown on Schedule A, hereto attached.

Second. The Telegraph lines specifically covered by this contract are shown on Schedule B and the wires thereon are of two kinds, designated on said Schedule as:

(*a*) Exclusive railroad wires,

(*b*) Commercial wires.

The term "exclusive railroad wires" shall be deemed to include the necessary instruments, switches, local batteries, loops and connections as now located, arranged and used on said wires, and as are necessary to continue in operation, the existing effective telegraphic circuits between the several stations and offices of
143 the Railroad Company in the various Cities, Towns and places on the route of the said railroads, and also one wire between Philadelphia and New York City, together with the existing local wires in New York City now connecting the various offices and piers of the Railroad Company as now located and arranged, and as shown in said Schedule B.

Third. The Railroad Company retains the ownership of the "exclusive railroad wires," as above defined.

Fourth. The Telegraph Company agrees to maintain, repair and reconstruct at its cost, in first class condition, all the said telegraph

lines and such additional wires as either the Telegraph Company or the Railroad Company may place thereon, the Railroad Company, however, furnishing the necessary unskilled labor for such maintenance, repairs and reconstruction of said lines and of said additional wires along said railroads; and also furnishing the necessary wire and material (not however including brackets and cross arms) for the maintenance, repair and reconstruction of the "exclusive railroad wires." The term "unskilled labor" shall not include either foremen, linemen, climbers, framers, nor any other laborers who require special skill in connection with telegraph construction and maintenance in order to properly perform the service, but shall include all the labor necessary to dig holes and set, reset and handle poles and other material; nor shall the Railroad Company furnish any tools required in connection with such work.

It is agreed that the location of any of the poles, wires or cables upon the right of way or property of the Railroad Company, shall from time to time, be changed thereon in such manner as the proper officers of the Railroad Company may direct, so as not to interfere with the operations of the Railroad, the Telegraph Company furnishing the skilled labor, and the Railroad Company the unskilled labor for such work.

Fifth. It is agreed that the Railroad Company shall have the right from time to time to acquire from the Telegraph Company or to erect necessary additional "exclusive railroad wires"
144 upon and along the telegraph lines of the Telegraph Company named in Schedule B, the Railroad Company paying the cost of the wire, insulators, and other material (not however, including brackets and cross arms) and the cost of the erection and equipment thereof; it being understood that where such wire acquired or erected is laid in cable in whole or in part, the Railroad Company shall only be charged with the pro rata cost of such conductor or conductors in said cable, as may be set apart for the exclusive use of the Railroad Company, and the pro rata rental of ducts in which the same may be placed. It is agreed however that if the Telegraph Company shall remove its poles and fixtures from any route of said Telegraph lines shown in Schedule B, in any City, Town or place, and re-locate the same in underground conduits or other structures, then the Telegraph Company shall remove the exclusive railroad wires from such poles and fixtures and place the same in such conduits or other structures or substitute new wires therefor in such conduits or other structures, the Railroad Company paying the cost of removing such wires and placing the same in said conduits or other structures, or the cost of such new wires and the pro rata rental of said conduits or other structure or the pro rata cost of construction thereof.

The Railroad Company shall not be required however to furnish any unskilled labor for maintenance, renewal, or reconstruction of any part of said telegraph lines not upon or along or adjacent to its right of way. And the Telegraph Company shall, upon the request of the Railroad Company connect by overhead wires the present

"exclusive railroad wires," and such as may be hereafter acquired or erected as herein provided, with additional offices, stations and buildings of the Railroad Company, in the several Cities and Towns on the route of said railroads, and also in the Cities of New York and Brooklyn, if and so long as the Telegraph Company shall have poles or house top fixtures available for reaching such additional offices, stations and buildings, and the Railroad Company agrees to
145 pay the cost of the wire, insulators and other material and the cost of the erection and equipment thereof; and also to pay any bridge and house top or fixture rentals which the Telegraph Company may have to pay for such wires. It being understood that in cases where it may be necessary to use aerial cables in the acquisition or erection of such additional wires and connections the Railroad Company shall only be charged with pro rata cost of such conductor in said aerial cable or cables as may be set apart for the exclusive use of the Railroad Company.

If the Telegraph Company shall have an underground conduit available for reaching the Railroad Company's offices, stations and buildings in any such town, City or place, the Telegraph Company will furnish the Railroad Company such connecting wires as the Telegraph Company may be able to supply in the said conduit or conduits used by it, the Railroad Company hereby agreeing to pay to the Telegraph Company the entire cost of the wire and of placing the same in the conduit, and the pro rata cost of construction or rental and maintenance of such conduit or conduits.

Sixth. The Telegraph Company shall furnish, free of cost, the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and hereby grants to the Railroad Company for use, upon the railroad wires, the free use of all telegraphic patents, which the Telegraph Company or its subordinate Companies, now, or hereafter own, or own and use for the general telegraph business; but this grant shall not require the Telegraph Company to make any payments on account of such free use to any minority interests in such subordinate Companies, but any such payments to minority interests shall be chargeable to the Railroad Company.

It is understood and agreed that the Railroad Company shall furnish all instruments, local batteries, stationery and other material for railroad business.

146 Seventh. The Railroad wires shall be used only by the Railroad Company for its railroad business, and shall not be used for the transmission of any commercial or public telegraph business, for tolls, except as hereinafter set forth. It is agreed, however, that where there is but one wire, as shown on said Schedule B., it may be used jointly by the Telegraph Company with the Railroad Company, important railroad messages, directing the movement of trains, having precedence, until such time as in the judgment of the President of the Railroad Company such joint use may be detrimental to the business of the Railroad Company, and in such case the Telegraph Company shall erect an additional wire for commercial business. In all other cases the railroad wires may from time to time be used by

the Telegraph Company jointly with the Railroad Company with the Railroad Company's assent, when not in use for railroad business.

Whenever the railroad wires have become disabled the Railroad Company shall have the right to take and use jointly with the Telegraph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires has been affected and the circuits restored.

But the through commercial wires or circuits shall not be subject to such use by the Railroad Company, except in cases of extreme emergency.

Eighth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroads as it may deem necessary.

At all telegraph stations of the Railroad Company, it shall furnish operators at its own expense; and its operators and other employees acting as agents of the Telegraph Company, shall receive, transmit, and deliver, exclusively for the Telegraph Company, such commercial or public messages as may be offered, and shall charge the tariff rates of the Telegraph Company thereon; and shall render to the Telegraph Company exclusively, monthly statements of such business and
147 full accounts of all receipts therefrom, and shall pay all of such receipts to the Telegraph Company in such manner and at such times as it may direct, but it is understood that in the transaction of all such telegraph business said operators and all other employees shall be held to be only the agents of the Telegraph Company, and shall conform to all rules, regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free.

And said operators and other employes shall not, without the consent of the Telegraph Company transmit over the Telegraph lines covered by this agreement, any free messages except those herein provided for.

Whenever the number of paid and collect messages sent from any railroad office amounts to 3,000 or more in any one year, (30 words of press matter sent being counted as one message) the Telegraph Company shall thereafter provide an operator for such office, so long as said messages amount to said number, and said operator acting as the agent of the Railroad Company shall attend to the telegraph business of the Railroad Company without charge, so long as one operator can attend to the telegraph business of both parties. No employee of the Railroad Company shall while in its service be employed in the transaction of commercial or public telegraph business by or for any party other than the Telegraph Company; and the Telegraph Company shall have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or public telegraph business as against any other party.

Ninth. If the Telegraph Company elects to establish an office in a station building of the Railroad Company the Railroad Company shall, if it can conveniently furnish the space therefor, provide office room in such building and light and fuel therefor, free of charge,

and if at such station one person can attend to the telegraph business of both Companies, the operator of the Telegraph Company at such office, acting as the agent of the Railroad Company, shall attend to the telegraph business of the Railroad Company without charge, and shall conform to all the rules and regulations of the Railroad Company applicable thereto.

Whenever the telegraph business of both Companies at any office where the Telegraph Company furnishes the operator becomes so large as to require more than one operator, then the Railroad Company shall employ and pay its own operator.

Tenth. The Telegraph Company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all Cities, Towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the Telegraph Company or its subordinate Companies in any of the said Cities, Towns and places and when so received shall be transmitted by the Telegraph Company over said telegraph lines free of charge. And if the same for any reason of convenience to the Telegraph Company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The Telegraph Company agrees to issue to such officers of the Railroad Company, as may be designated by the President or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the Telegraph Company, or its subordinate Companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum calculated at the regular commercial day rates of the Telegraph Company between the points at
149 which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

Eleventh. The Railroad Company agrees to transport, free of charge over its said railroads, on application of the Superintendent or other proper officer of the Telegraph Company, all employees of

the Telegraph Company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge, all poles and other material and supplies of the Telegraph Company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B, along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the Railroad Company also agrees to transport, free of charge, the employes of the Telegraph Company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the Telegraph Company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company than those hereinbefore named
150 whether on or off the line of said railroads, to an amount not exceeding ten thousand — ($10,000.00) per annum, calculated at the current transportation rates of the Railroad Company; and the Telegraph Company agrees to pay to the Railroad Company one half of its aforesaid rates on all such transportation of employes and poles and other material in excess of said amount. Settlements to be made yearly.

Twelfth. The Telegraph Company agrees to pay to the Railroad Company the sum of sixty thousand dollars per annum, in equal instalments of five thousand dollars at the close of each month, during the continuance of this agreement, accounting from October 15th, 1887.

Thirteenth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save the Railroad Company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free or at half rates over said railroads under this agreement, whether such loss or damage arise from the neglect of said Railroad Company or its employes or otherwise, and shall likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business; and the Telegraph Company shall not be responsible for and the Railroad Company agrees to indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure delay or default in the transmission or delivery of any and all messages sent for the Railroad Company under this agreement.

Fourteenth. Neither the general terms of this agreement nor any stipulation contained herein shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the Railroad Company, and in favor of the Telegraph Com-
151 pany, as against the owner of the fee simple of the land over

which the Railroad Company or of any of its subordinate Companies, has the right of way. Nor as against the exercise of the power of eminent domain on the part of any other Companies possessing it by grant from any state, or of the United States.

And it is further agreed that if anything herein contracted to be done, or not to be done shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of any excess or defect of corporate or legal authority in so doing.

Fifteenth. Should the Railroad Company build new extensions or branches or acquire other railroads by purchase, lease, ownership of stock or otherwise, then the provisions of this contract shall apply thereto and to the telegraph lines thereon, to the same extent as if such telegraph lines and railroads had been included in said Schedule-A, and B.; and if there be no telegraph line on such roads then the Telegraph Company shall furnish material and construct one thereon, and maintain, repair and reconstruct the same, the Railroad Company hereby agreeing to furnish the unskilled labor for such construction, maintenance, repair and construction of such line, and of such additional wires as may be erected thereon; and the Telegraph Company will set apart thereon for the Railroad Company's railroad business one exclusive railroad wire. If there be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road then there shall be set apart for the use of the Railroad Company such "exclusive railroad wire or wires" thereon as may have been previously used for railroad business exclusively.

If the Railroad Company shall acquire a telegraph line on any such road, the Railroad Company agrees to sell and the Telegraph Company agrees to purchase, such telegraph line at a valuation to be agreed upon, based on the cost of constructing and equipping
152 a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment.

If the parties hereto cannot agree upon such valuation, the same shall be fixed by arbitrators to be appointed in the manner hereinafter provided.

Upon all such extensions, branches, and leased controlled or hereafter acquired roads, the Railroad Company shall be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of Article 10 hereof on said existing railroads, and the ten thousand dollar per year limit of free telegraphic service, as provided by the second clause of said Article 10, shall be increased six dollars per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled, or hereafter acquired roads; and the Telegraph Company shall be entitled to free transportation service for employes poles and other material and supplies to the same extent for use thereon, and in the same manner as provided by the first clause of Article 11 hereof; and the ten thousand dollar per annum limit for free transportation provided for by the second clause of Article 11

shall be increased six dollars per annum per mile of such road occupied as aforesaid.

Sixteenth. The Railroad Company so far as it lawfully may hereby grants and covenants and agrees to assure to the Telegraph Company the exclusive right of way on, along and under the lands, roads and bridges, of the Railroad Company, and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon the said existing lines of poles and any renewals thereof upon said rail-
153 roads, and also the right to construct one additional line of poles and wires or an underground line upon, along or under said railroads, as the Telegraph Company may deem expedient, but the location of any such additional line of poles and wires, or underground structures, shall be made in such way as not to interfere with the operations of the Railroad Company, and at such places on the right of way or lands of the Railroad Company as shall be designated by the proper officer of the Railroad Company. And the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, so far as the Railroad Company legally may.

And the Railroad Company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other telegraph or telephone line in competition with the lines or business of the Telegraph Company, except at and for the Railroad Company's current local rates; nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, so far as such refusal and limitation of transportation may be lawful; provided, always that in protecting and defending the exclusive grants herein conveyed the Telegraph Company may use or proceed in the name of the Railroad Company or of any subordinate Company whose road or property may be owned, leased or controlled by the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, cost, charges and legal expenses incurred therein or thereby.

But this contract shall not be held to require the Railroad Company to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than said existing telegraph lines and renewals thereof upon said railroads, and the additional wires
154 that may be placed thereon and the lines hereinbefore provided for on extensions, branches and acquired roads.

Seventeenth. The term "Subordinate Companies" as used in this contract, shall be deemed to include all Companies controlled by ownership of stock, lease, contract for operation or in any other manner by either of the parties hereto.

And the term "telegraph line" or "telegraph lines" shall be

deemed to include the line of poles, wires, cable and cables thereon, batteries connected therewith, and other devices necessary for their efficient telegraphic operation.

Eighteenth. It is mutually understood and agreed that the telegraph lines, poles, wires and fixtures covered by this contract, shall form part of the general telegraphic system of the Telegraph Company and shall be controlled and regulated by the Telegraph Company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests.

And the Railroad Company expressly agrees that no wire now or hereafter owned, leased, controlled or used by it, shall at any time be used or employed directly or indirectly in competition with the Telegraph Company, or by or for any party other than the Railroad Company and the Telegraph Company, and the Railroad Company will not at any time during the continuance of this agreement engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of this agreement.

Nineteenth. It is agreed that the management and control of the railroad employes so far as engaged in telegraphic duties upon said railroads and of employes of the Telegraph Company engaged in the maintenance, repair, renewal or reconstruction of said telegraph lines along said railroads, and the distribution of men, material and supplies therefor, shall be vested in a competent joint Superintendent of telegraph who shall be appointed and whose salary shall be
155 fixed by the Railroad Company, with the approval of the Telegraph Company; and the salary of said joint Superintendent shall be paid equally by the Railroad and Telegraph Company and said Joint Superintendent shall be removable for cause by either party and shall be subordinate to and under the control of the Telegraph Company, so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of said Company's lines, and the transaction of the commercial telegraph business upon said railroads; and said Joint Superintendent shall decide upon the number of linemen to be employed for ordinary repairs and the places at which they shall be stationed after consultation with both parties hereto; and he shall also be subordinate to and under the control of the Railroad Company so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, management, arrangement and operation of said Company's exclusive railroad wires. It being understood and agreed that he shall co-operate with both parties hereto in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon.

The Railroad Company shall furnish office room and light and fuel therefor for said Joint Superintendent and each party shall supply clerical force for its own business.

Twentieth. In case of any disagreement between the parties hereto concerning the meaning of any of the provisions of this agreement or the operations hereunder, such difference shall be

referred to three arbitrators, one to be chosen by each party and the third to be selected by the two thus chosen. And the decision of a majority of such arbitrators shall be final and conclusive upon the parties. In case either party neglects for the period of thirty (30) days to appoint an arbitrator after delivery to
156 it of written notice by the other party, the party not in such default may appoint such arbitrator, and the two thus selected may choose a third, and the decision of a majority of the three thus chosen shall be final and conclusive.

Twenty-first. The execution of this agreement shall terminate all previous agreements now existing or which may be claimed to exist between the parties hereto, or their predecessors of their sub Companies respectively, in the ownership or control of their properties respectively, and covering the construction, maintenance or operation of telegraph lines along the railroads or any of them covered by this agreement; and this agreement shall continue in force for the term of fifty (50) years from October 15th, 1887; and may be renewed after the expiration of said term for further terms of fifty (50) years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the first and each successive period of fifty years. A violation of any of the provisions of this agreement by either party while entitling the other to a claim for damages and the usual remedies for specific enforcement shall not be held to void this agreement or to abrogate the obligations or the undertakings of either party hereto.

In Witness Whereof the parties to these presents have caused the names of their proper officers to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY.

(Signed) By JNO. VAN HORNE,
[SEAL.] *Vice-President.*

(Signed) A. R. BREWER, *Secretary.*

THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Signed) By S. SPENCER,
[SEAL.] *President.*

(Signed) ANDREW ANDERSON, *Secretary.*

157 SCHEDULE "A."

List of Railroads Owned, Operated or Controlled by the Baltimore and Ohio Railroad Company.

Philadelphia Division.

Comprising the following lines:

Philadelphia Branch, Baltimore to State line between Delaware and Maryland.

Baltimore and Philadelphia Railroad from State line between Maryland and Delaware to Philadelphia.

Landenburg Branch from Wilmington, Delaware, to Landenburg, Penn.

Schuylkill River East Side Railroad in the City of Philadelphia with Branch line to Delaware River.

Main line and Branches east of the Ohio River as follows:

Main line Baltimore to Wheeling.

Washington Branch, Relay, Maryland, to Washington, D. C.

Curtis Bay Branch, Baltimore to Curtis Bay.

Alexandria Branch, Alexandria Junction to Sheppards.

Metropolitan Branch, Washington, D. C. to Washington Junction, Maryland.

Frederick Branch, Frederick Junction to Frederick, Maryland.

Washington County Railroad, Weverton, Maryland, to Hagerstown, Maryland.

South Branch Railroad, Green Spring to Romney, West Virginia.

Parkersburg Branch Railroad, Grafton to Parkersburg, W. Va.

Fairmont, Morgantown and Pittsburgh Railroad, Fairmont to Morgantown.

158 Pittsburgh Division.—Cumberland, Maryland, to Pittsburgh, Penn.

Salisbury Railroad, Salisbury Junction to West Salisbury, Penn.

Short Line Railroad, O. and B. Junction to Trotter's, Penn.

Hickman Run Branch, Hickman to Cora, Penn.

Somerset and Cambria Railroad, Rockwood to Johnstown Penn.

Berlin Branch, Berlin to Garrett, Penn.

Fayette County Branch, Cromwell to Uniontown.

Mount Pleasant Branch, Broad Ford to Mount Pleasant, Penn.

Wheeling, Pittsburgh and Baltimore Railroad, Glenwood, Penn., to Wheeling, West Virginia.

Harpers Ferry and Valley Branch Division.

Winchester and Potomac Railroad, Harpers Ferry to Winchester.

Winchester and Strasburg Railroad, Winchester to Strasburg.

Harrisonburg and Strasburg Railroad (leased line of Va. Mid.) Strasburg to Harrisonburg.

Trans Ohio Divisions.

Central Ohio Railroad, Columbus to Bellaire, Ohio.

Sandusky, Mansfield and Newark Railroad, Sandusky to Newark, O.

Newark, Somerset and Straitsville Railroad, Newark to Shawnee, Ohio.

Baltimore and Ohio and Chicago Railroads, Chicago Junction to Chicago, Illinois.

159 In the Circuit Court of the United States for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The Answer of the Baltimore and Ohio Railroad Company, the Defendant Herein, to the Bill of Complaint of Western Union Telegraph Company, Complainant.

160 In the Circuit Court of the United States for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The Answer of the Baltimore and Ohio Railroad Company, the Defendant Herein, to the Bill of Complaint of Western Union Telegraph Company, Complainant.

The defendant, The Baltimore and Ohio Railroad Company, now and at all times herein saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

1. The defendant admits that it is a corporation organized under the laws of the State of Maryland and a citizen and resident of that State, having its principal place of business in the City of Baltimore, State of Maryland, as alleged in the Bill of Complaint herein.

161 2. The defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the Bill of Complaint herein. The defendant also admits the allegations of paragraphs 5 and 6 of said Bill of Complaint, but for greater certainty as to the intent and terms of the contract therein referred to, begs leave to refer to the full text thereof as set forth in Exhibit "A" of said Bill.

3. Answering the allegations of paragraph 7 of the Bill of Complaint herein, the defendant admits that the complainant has kept and performed the obligations and requirements of the contract, set forth as Exhibit "A" of the Bill of Complaint herein, in all essential particulars, and has for that purpose expended large sums of money in the manner set out in said paragraph 7, and that the defendant has at all times availed itself of the facilities afforded to it by the complainant under said contract without complaint on its part, that

the said complainant was delinquent in performing the said contract in any substantial particular. The defendant further says that all minor failures by the complainant to carry out the terms of said contract have either been adjusted between the parties or are in process of amicable adjustment.

4. The defendant admits the allegations of paragraphs 8 and 9 of the Bill of Complaint herein.

5. The defendant admits the allegations of paragraph 10 of the Bill of Complaint herein and further answering said paragraph the defendant says that on September 15, 1906, the Interstate Commerce Commission in a general tariff circular, formally promulgated the following administrative ruling:

"Payment for Transportation. Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different
162 compensation than the established rates in effect at the time precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

And the defendant says that thereafter, on October 12, 1906, the said Interstate Commerce Commission promulgated a further administrative ruling, as follows:

"Issuance and Use of Free Passes. The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all of their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

"But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person travelling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon, the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interest of, the carrier by which he is employed.

"Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself."

And the defendant says that thereafter a petition was filed with the Interstate Commerce Commission by the complainant herein and by the Postal Telegraph Company jointly, asking for a modification

of the rulings hereinbefore set forth, so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies under which the said railroad companies agreed to furnish "free" or "re-
163 duced-rate" transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers. And the defendant says the Interstate Commerce Commission, after consideration of said petition, issued, on December 27, 1906, a decision denying the said petition.

And the defendant says that thereafter, on June 3, 1907, the said Interstate Commerce Commission promulgated the following ruling:

Transportation of Men or Property for Telegraph Companies (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

"This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service."

164 And the defendant says that thereafter, on June 30, 1908, the Interstate Commerce Commission promulgated the following rule:

"Notice as to the Issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

"Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

"1. Officers or employees of news companies other than newsboys.

"2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad * * *"

And the defendant says that its refusal to further perform certain obligations created by said contract as set forth in paragraph 10 of the Bill of Complaint herein and its statement that such portions of the said contract were annulled by the Hepburn Act as alleged in said paragraph 10 of the Bill of Complaint, were and are in strict conformity with the rulings of the Interstate Commerce Commission hereinbefore set forth and with said Hepburn Act as interpreted by the said Interstate Commerce Commission. The defendant further says that its said refusal was due to and because of the rulings of the said Interstate Commerce Commission and advice of counsel that said rulings were lawful and in conformity with the said Hepburn Act and that it was the defendant's legal duty strictly to comply with the same.

165 6. Referring to paragraph 11 of the Bill of Complaint herein the defendant submits that said paragraph states conclusions of law embodying the principal and perhaps the only issue in this case, and that the defendant need not, therefore, either admit or deny the allegations of said paragraph; but further referring to said paragraph defendant admits that the complainant and the defendant intended by the contract, Exhibit "A" of the Bill of Complaint, to create a joint relation in the construction, maintenance and operation of telegraph lines and property, and that said telegraph lines are an indispensable instrumentality for the performance by each of the parties to said contract of the obligators assumed by it in the transaction of its business.

7. The defendant admits the truth of the allegations of fact of paragraphs 12 and 13 of the Bill of Complaint herein.

8. Answering the allegations of paragraph 14 of the Bill of Complaint herein the defendant admits that the complainant stands ready and is able and willing to perform each and every provision of the contract Exhibit "A" and all conditions and obligations imposed upon the complainant by said contract.

9. Referring to paragraph 15 of the Bill of Complaint herein the defendant submits that said paragraph states conclusions of law and that the defendant need not therefore either admit or deny the allegations of said paragraph.

10. Referring to paragraph 16 of the Bill of Complaint herein the defendant admits the allegations of fact therein contained. The defendant submits that it is not called upon either to admit or deny the allegations of law contained in said paragraph.

Wherefore the defendant having fully answered, confessed, traversed, avoided or denied all the matters in the said Bill
166 of Complaint material to be answered according to its best knowledge and belief, humbly prays this Honorable Court to enter its decree that the defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By HUGH L. BOND, JR., *Second Vice-President.*

WILLIAM AINSWORTH PARKER,
H. L. BOND, JR.,
Solicitors.

167 UNITED STATES OF AMERICA,
District of Maryland, ss:

Hugh L. Bond, Jr., being duly sworn, says that he is Second Vice-President of the Baltimore and Ohio Railroad Company, defendant in the above entitled action; that he has read the foregoing answer to the Bill of Complaint herein and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

HUGH L. BOND, JR.

Subscribed and sworn to before me, the seventh day of October, 1908.

[NOTARIAL SEAL.] GEO. W. HAULENBEEK,
Notary Public.

My commission expires May 1, 1910.

168 In the Circuit Court of the United States for the District of Maryland.

THE WESTERN UNION TELEGRAPH COMPANY

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Decree.

This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by

Congress "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to Regulate Commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22 day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs.

JOHN C. ROSE, *Judge.*

UNITED STATES OF AMERICA,
District of Maryland, To-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the Decree of Court, which was entered and filed on the 22nd day of June, 1910, in the therein en-
169 titled case of The Western Union Telegraph Company vs. The Baltimore and Ohio Railroad Company, No. 56 Equity Docket "F," in said District Court, transferred from the Circuit Court of the United States for the District of Maryland, by Act of Congress, approved March 4th, 1911.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 8th day of June, 1916.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 6/8/16. A. L. S.]

170 [Endorsed:] P. Ex. 6, June 21, '16.

171 PLAINTIFF'S EXHIBIT No. 7.

G. A. H.

Post Office Department.

WASHINGTON, D. C., July 10th, 1893.

I, Frank H. Jones, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the city of Washington, the day and year above written.

[Seal Post Office Department, United States of America.]

FRANK H. JONES,
Acting Postmaster General.

172 This is to certify that the Postal Telegraph-Cable Company a corporation duly organized under the laws of the State of New York for the purpose of constructing, maintaining, and operating lines of telegraph throughout the United States, has by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5268 of the Revised Statutes of the United States, all the restrictions and obligations required by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations.

In witness whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by its President and attested by its Secretary at the City of New York, this seventeenth day of March eighteen hundred and eighty six.

POSTAL TELEGRAPH-CABLE COMPANY,
By JAMES H. WITHINGTON, *President.*

Attest:

[Seal Postal Telegraph-Cable Company, Incorporated 1886.]

J. O. STEVENS, *Secretary.*

173 [Endorsed:] 78. Acceptance of Postal Telegraph-Cable Company. Certificate accepting provisions of Sec. 5268 of the Revised Statutes of the United States. Dated March 17, 1886. Received Ap'l 6, 1886. Address of Company, James H. Withington, President, New York, N. Y.

174 [Endorsed:] Exhibit No. 2. Apr. 17, 1895. Edwin L. Allen, Stenographer. Certified Copy of Acceptance of Post Road Act of Congress by Postal Telegraph-Cable Co. (N. Y.) P. Ex. 7. June 21, '16.

175 G. A. H.

Post Office Department.

WASHINGTON, D. C., July 10th, 1893.

I, Frank H. Jones, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the city of Washington, the day and year first above written.

(Blue ribbon.)

(Sgd.) FRANK H. JONES,
[SEAL.] *Acting Postmaster-General.*

176 This is to certify that the Postal Telegraph-Cable Company a corporation duly organized under the laws of the

State of New York for the purpose of constructing, maintaining, and operating lines of telegraph throughout the United States, has by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5268 of the Revised Statutes of the United States, all the restrictions and obligations required by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations.

In witness whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by its President and attested by its Secretary at the City of New York, this seventeenth day of March eighteen hundred and eighty six.

POSTAL TELEGRAPH-CABLE COMPANY,
By JAMES H. WITHINGTON, *President.*

Attest:

[Seal Postal Telegraph-Cable Company, Incorporated 1886.]

J. O. STEVENS, *Secretary.*

[Endorsed:] 78. Acceptance of Postal Telegraph-Cable Company. Certificate accepting provisions of Sec. 5268 of the Revised Statutes of the United States. Dated March 17, 1886. Received Apl. 6, 1886. Address of Company, James H. Withington, President, New York, N. Y.

177 [Endorsed:] Certified Copy of Acceptance of Post Road Act of Congress by Postal Telegraph-Cable Co. N. Y.) P. Ex. 7. June 21, '16.

PLAINTIFF'S EXHIBIT No. 8.

178 "9. Whereas the Railway Companies in the United Kingdom are for the most part either themselves Owners of Telegraphs which are used for the Conveyance of public Messages, and which are also essential for the safe Conduct of the Traffic on their respective Undertakings, or they have contracts for various Terms of Years with Telegraph Companies, whose Telegraphic Apparatus is placed in the Stations and along the Railways and Canals of the Railway Companies, by which Contracts Provision is made with respect to the Matters aforesaid: * * *

"(1) The Postmaster General shall give to each Railway Company Three Months' Notice before he acquires the Undertakings of any of the Telegraph Companies with which the Railway Company has Agreements; and on the Expiration of such Notice such Agreements shall cease and determine:

"(2) On such Acquisition as aforesaid all the Posts, Wires, Instruments, and other Telegraphic Apparatus belonging to the Railway Company, and also all Posts, Wires, Instruments, and other Telegraphic Apparatus belonging to the Telegraph Companies on the

Railway Company's Lines and Canals which are necessary for establishing a complete System of Telegraphy in connexion with the working of Trains and the Traffic of the Lines and Canals, shall become the absolute Property of the Railway Company, and shall be handed over to them by the Postmaster General free of Charge in efficient working Order, so that the Railway Company may be in a position at once to take up and carry on their own Telegraph Work on their own System, and thereafter the said Posts, Wires, Instruments, and other Telegraphic Apparatus shall be maintained and worked by the Railway Company:

"(3) On such Acquisition as aforesaid the Postmaster General shall be entitled to use from Telegraph Stations not on the Lines of Railway all the Wires belonging to the respective Telegraph Companies on the Line, and employed exclusively in the Transmission of the public Telegraph Business, which are erected on the Poles to be handed over to the Railway Company under Paragraph — (2); and he, at his Cost, shall also be entitled to call upon the Railway Company to erect and maintain additional Wires on the said Poles, provided they are sufficiently strong and high for the Purpose; and also to erect new Poles at Places to be agreed upon with Wires over any of the Lines and Canals of the Company, but so that such new Poles shall not interfere in any way with the Convenience or working of the Railway or Canals of the Company, or obstruct the working of the Traffic thereon. The Railway Company shall maintain all the Posts and Wires used for public Messages, the Postmaster General paying for the same as may be agreed or settled by Arbitration:

179 "(4) The Postmaster General may require the Railway Company to affix Wires to existing Posts (if they can bear them), and the Company may have a like Power to affix Wires to the Posts belonging from Time to Time to the Postmaster General, if sufficient for the Purpose, and the Cost of Maintenance of such Posts shall be divided between the Postmaster General and the Company, in proportion to the Number of Wires belonging to each on each Post:

"(5) The Railway Company may shift the Poles, Wires, and Apparatus belonging to the Postmaster General when necessary for the Purposes of their Works or Traffic; but in all such Cases the Postmaster General shall pay to the Railway Company the actual Costs incurred in shifting such Poles and Apparatus, but if such Poles support the Wires of the Railway Company and of the Postmaster General, the Cost of shifting the same shall be apportioned according to the Number of Wires belonging to or respectively used by the Railway Company and the Postmaster General.

"(6) The Postmaster General shall pay the Railway Company the following Sums by way of Compensation:

"*a*. Twenty Years' Purchase of the Amount of the net annual Receipts (if any) of public Telegraph Messages received and forwarded by the Railway Company on their own Account, reckoned on the Basis of the Receipts derived therefrom over a continuous Period of Twelve Months prior to the Thirtieth Day of June One thousand eight hundred and sixty-eight:

"*b.* Twenty Times the Amount of the estimated annual Increase, calculated upon the average Increase of the preceding Three Years of the said Receipts from Telegraphic Messages, or where the Business has been commenced within Three Years calculated upon the Increase during such shorter Period, such annual Amount in case of difference to be settled by Arbitration:

"*c.* All Rents and annual or other Payments payable to the Railway Company by public Telegraph Companies during the still unexpired Periods embraced in their respective Agreements, and at the Terms mentioned in said Agreements respectively:

"*d.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, in respect of the Loss by the Railway Company of the Privilege of granting other Way-leaves and making future Arrangements with Telegraph or other Companies, and in respect of granting a Monopoly to the Postmaster General for the Conveyance of Telegraphs over their Railways as herein provided for:

180 "*e.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, as the Value of the Railway Company's Reversionary Interest (if any) in the Telegraph Receipts from public Messages on the Expiration of the Agreements with the respective Telegraph Companies:

"*f.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, for the Loss occasioned by Removal of any Clerks now provided by the Telegraph Company, and for any extra Cost which the Railway Company may incur in working their Telegraph for Railway Purposes as a separate System:

"*g.* The Postmaster General shall transmit to their respective Destinations all Messages of the Railway Company in any way relating to the Business of the Company to and from any 'Foreign Stations' in the United Kingdom free of Charge:

"*h.* On such Acquisition as aforesaid the Postmaster General shall, as herein provided, have a perpetual Right of Way for his Poles and Wires over the whole of the Railway Company's System, and in consideration thereof he shall pay to the Railway Company such Sum per Mile per Wire over the whole of the said System, by way of yearly Rent, as shall be determined by Agreement between the Parties, or failing Agreement, as shall be fixed by Arbitration:

The Arbitrator, in determining the Amounts to be paid to the Railway Company under this Act, shall have regard to the Agreements which subsist between the Railway Company and any Telegraph Company, and also to a compulsory Sale being required from the Railway Company; and in estimating the Amount to be paid under any one Part of this Section shall have regard to the Advantages to be obtained and the Disadvantages to be sustained by the Railway Company under any other Part of this Section:

"(7) The Railway Company shall, if required by the Postmaster General so to do, from Time to Time, at such Times and under such Regulations as shall be agreed upon, receive Messages for Transmission by the public or private Telegraph Wires (but if the latter, the Railway Messages to have priority), and shall at the Postmaster Gen-

eral's sole Risk and Expense transmit the same either to their Place of Destination, if upon the Company's Lines, or to some convenient Post Office as shall be arranged, and in respect of such Receipt and Transmission the Company shall act as Agents of the Post-
181–188 master General, and shall receive in respect thereof such Remuneration as shall be agreed upon, or in case of Difference as shall be from Time to Time settled by Arbitration. The Postmaster General to provide the necessary Instruments at the Railway Company's Stations for the public Wires, such Instruments to be maintained by the Railway Company at the Expense of the Postmaster General:

"(8) The Railway Company may, notwithstanding anything in this Act contained, and without Payment to the Postmaster General, from Time to Time make Arrangements with Coalmasters, Ironmasters, and Traders generally upon the Company's System for the Erection and working of private Telegraphs between Coalpits, Ironworks, Factories, Warehouses, and Offices in connexion with the Stations of the Company, or over their Line; but such Telegraphs shall be used for the Transaction of private Business only, and no Money Payment shall be made or received in respect thereof except by way of annual Rent or Payment for Wayleave and other Accommodation:

"(9) Except as aforesaid, the Railway Company shall not transmit or permit the Transmission of any Telegraphic Message through their Wires:

"(10) All Matters of Difference between the Postmaster General and Railway Companies arising under this Act shall be settled by Arbitration, in conformity with the Enactments of 'The Railway Companies Arbitration Act, 1859,' with respect to the Settlement of Disputes by Arbitration; and the Provisions of that Act with respect to Arbitration shall for these Purposes be incorporated with this Act:

"(11) Notwithstanding anything specified in this Act or in any Agreement by this Act confirmed, the Umpire to be appointed in any Arbitration between the Postmaster General and any Railway Company shall, in default of Appointment by the Arbitrators, be nominated by the Chief Justice of Her Majesty's Court of Common Pleas at Westminister for the Time being."

[Endorsed:] P. Ex. 8. June 21, '16.

189 P. Ex. 9.

June 21, '16.

From the time of the first Telegraph Act, 1863, telegraph undertakers have always had the power of using both the roads and the railways of the country. The Telegraph Act, 1863, gave the old telegraph companies the right to put their telegraphs upon the railways of the country, but it was qualified by the obligation to obtain the consent of the directors of the companies. The result of that state of things was that the telegraph companies made

rather complicated arrangements with the various railway companies, the general character of those arrangements being that the telegraph companies put up lines of telegraph along the railways, and maintained them for the railway companies, and the railway companies in return gave them the right of using their lines for the public telegraphs. The telegraph companies put up their lines, and some of those were used by the railway companies, and they obtained the use of those lines free of expense; and, on the other hand, the telegraph companies had a similar right of carrying their telegraph lines which they used for public messages along the railway. They got their wayleave, and the railway companies got their telegraph lines free. That was the general nature of the arrangement. At the time that the transfer of the telegraph took place in 1870, the railway companies of the country were so extensively used that out of 88,000 lines of public telegraphs throughout the country 40,000 were constructed on railways. Then, when the telegraphs were taken over by the State, a new arrangement was come to by the various railway companies, and the general nature of that arrangement was this. The railway companies surrendered the right which some of them previously exercised—some did and some did not—to transact public telegraph business. The Postmaster-General handed over to the railway companies all the telegraphs which had previously been used for railway purposes, although
190-246 they had been put up, and constructed by the telegraph companies, and made those over to the railway companies, and those became the absolute property of the railway companies. Then the Postmaster-General retained the telegraphs which had been put up along the railways, and which had been used for public purposes—those became his property—they were the property of the old telegraph companies, to whom, of course, the Postmaster-General paid compensation, and they became the property of the State. Then the Postmaster-General obtained a general wayleave over the whole system of the country. Then, another feature of the arrangement was that, whereas previously the telegraph companies had maintained all the lines of telegraph on the railways, after the transfer of the telegraph it was arranged that the railway companies should undertake the work of maintenance, and from that time they maintained, not only their own telegraphs on the railways, but the Postmaster-General's telegraphs, and the Postmaster-General paid them a certain agreed sum for the maintenance of his lines. Then the Postmaster-General undertook to transmit railway messages free of charge, which is another very valuable concession made to the railway companies, one which is now represented by very large sums of money; and, in addition to all that, the Postmaster-General paid a very considerable sum of money to the companies, in some cases in the form of lump sums paid down, and in other cases in the form of annual payments. I think the Telegraph Acts have been handed round to the Committee. I have put together the different Acts which bear upon the subject, and the arrangements with the railway companies, which I have been summarising, will be found in Section 9 of the Telegraph Act, 1868.

A number of the companies are actually mentioned in Section 9, and Section 9 indicates the arrangement made with them; then with other companies agreements were made very much on the same lines, and those agreements are confirmed by Section 13 of the Act of 1868. The total amount, Sir, which was paid to the railway companies under those arrangements in capital sums paid down was over one and a half millions. In addition to that, annual sums amounting to more than £25,000 a year are paid to railway companies for the right of using their lines—a wayleave over their lines—and in addition to that, more than £75,000 a year are paid by the Postmaster-General to the companies in respect of maintenance of the lines of telegraphs which are constructed along the railways.

247-249 PL. EX. 10.

287. I am not sure whether there is any point in this; but does not the Post Office send, and did not the telegraph companies from the beginning send, messages for the railway companies free of cost?—Yes, and we do so now.

288. Has not that very much increased during these years?—Yes, certainly since the agreement was made.

250 PLAINTIFF'S EXHIBIT NO. 11.

Extract from pp. 410, 411, *of* 31 *Interstate Commerce Rep., July 15th*, 1915.

"IV.

"The practice of granting free transportation to passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers. It appears from the Commission's compilation of the answers to the questions addressed by it to the carriers, that there were issued during the eleven months ending November 30th, 1913, by seventy-eight of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of 482,709. These trip passes represented 88,575,298 passenger-miles.

"June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger-miles.

The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger-mile in official classification territory in 1913, the passenger-miles represented by trip passes alone would have yielded in passenger revenue $18,-

520,000. Some of these passes were no doubt issued to em-
251 ployees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

"Compilations prepared by the Commission show that the revenue from private cars handled free during the year 1913 on eighty-eight of the roads which have made answer to our question would, at tariff rates, have amounted to $644,250.79.

"But the direct cost and revenue loss attendant upon the present practice are less serious than is its demoralizing effect. It is natural that subordinates should be wasteful when their superiors are extravagant; and that efforts to secure economies should often prove futile when, at the expense of stockholders or the public, the luxury of a private car is freely granted for personal and private use to officers and directors or even to subordinate officials and members of their families. The record of one of the railroads most prominent in the appeal for a freight rate advance discloses such liberal grant of free transportation of private cars, not only to directors and officers of other independent railroads, but to lesser officials of such carriers and to members of their families. Among
the beneficiaries were the wives of first, second and third vice-
252 presidents, the wife of a superintendent, the wife of a superintendent of telegraph, the mother of a chairman, the secretary of the vice-president of a telegraph company, and the chief clerk to a president. Indeed, not a private car merely, but two special trains were furnished free to the widow of a former director, the tariff rate for which service would have been $3,466. The wife and daughter of the president of that company enjoyed in a single year free transportation in private cars for nine trips on which the tariff rates would have aggregated $3,577."

[Endorsed:] P. Ex. 11. June 21, '16.

253 PLAINTIFF'S EXHIBIT No. 12.

British Post Office Telegraphs.

The following figures showing the operating results of the British Post Office Telegraphs, are taken from the reports of the Postmaster General of Great Britain.

Year ending March 31st.	Receipts.	Actual operating expenses.	Operating loss.	Total annual loss including interest paid and fresh money expended.
1908....	£3,103,361.	£3,508,568.	£405,207.	£969,485.
1909....	3,098,452.	3,672,254.	573,802.	1,046,757.
1910....	3,165,549.	3,599,078.	433,529.	1,049,213.
1911....	3,166,007.	3,695,615.	529,608.	1,186,673.
1912....	3,194,484.	3,757,368.	607,884.	1,068,148.
1913....	3,176,327.	3,524,050.	347,723.	1,175,347.
1914....	3,118,216.	3,509,010.	390,794.	1,211,742.
1915....	3,418,954.	3,714,198.	295,244.	1,232,955.

P. Ex. 12. June 21, '16.

254 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant, Respondent.

It is hereby stipulated that the twelve original exhibits accompanying this stipulation are the exhibits referred to on pages 38 and 39 of the printed case on appeal in this Court, and that defendant's Exhibit "A" is the same as the copy of contract attached to defendant's answer in this case.

Dated February 7th, 1917.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.
STEELE, DE FRIESE & STEELE,
Attorneys for Defendant-Respondent.

Endorsed on cover: File No. 25,761. New York Supreme Court, Appellate Division, First Department. Term No. 931. Postal Telegraph-Cable Company, plaintiff in error, vs. Tonopah and Tidewater Railroad Company. Filed February 8th, 1917. File No. 25,761.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 130.

POSTAL TELEGRAPH-CABLE COMPANY,
PLAINTIFF IN ERROR,

vs.

TONOPAH & TIDEWATER RAILROAD COMPANY.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

No. 404.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY.

MOTION TO CONSOLIDATE.

Now comes Bynum E. Hinton, appearing on behalf of plaintiff in error, Postal Telegraph-Cable Company, in the first and last of the above-entitled causes, and moves the

1m

court to consolidate the said three causes to be heard when the first case, the Postal Telegraph-Cable Company *vs.* Tonopah & Tidewater Railroad Company, is reached.

The case of Postal Telegraph-Cable Company *vs.* Tonopah & Tidewater Railroad Company was an action brought in the Municipal Court of the City of New York, Borough of Manhattan, First Department, by the Telegraph Company for the recovery of seven dollars and thirty-two cents ($7.32), alleged value of services for transmission and delivery of certain interstate telegraph messages transmitted at the request of the Railroad Company.

The Railroad Company as defense to said action pleaded that on or about the 26th day of June, 1907, the plaintiff and the defendant entered into a contract in writing, whereby it was covenanted and agreed that the Telegraph Company should transmit telegrams and messages relative to the business of the Railroad Company, at the Railroad Company's request, without compensation, in consideration for certain free transportation to be furnished by the Railroad Company to the officers and employees and laborers of the Telegraph Company.

There was no issue of fact between the parties, the only issue involved being the validity of the contract in question, in view of the act of Congress of June 18, 1910 (U. S. Comp. Stat., Sec. 8563, Subd. 3), (which placed telegraph companies within the Interstate Commerce Act) as construed by the Interstate Commerce Commission in its ruling of March 28, 1916. (p. 22 of Record, 959.)

The court held:

> "This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to the facts, and hence that question of law stands out clear and distinct. It is whether the Interstate Commerce Act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28, 1916, is constitutional under the Constitution of the United States, as applied to

the contract in evidence in this case, between the plaintiff and defendant, made prior to the act of Congress of June 18, 1910, which placed telegraph companies within the Interstate Commerce Act. In other words, could an act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the Interstate Commerce Act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract is unconstitutional and accordingly I direct judgment for the defendant." (p. 40, Record, 402.)

This judgment was affirmed by the Supreme Court and Appellate Division of the State of New York, and comes to this court on writ of error.

The case of Western Union Telegraph Company *vs.* Baltimore & Ohio Railroad Company was a suit brought in the United States District Court for the Southern District of New York by the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company on a bill in equity praying adjudication (1st) that a certain contract between the parties, made October 15, 1887, is lawful and binding; (2d) that the Telegraph Company be required specifically to perform the contract; and (3d) that the Telegraph Company be perpetually enjoined from violating the contract. The prayers of the petition were granted by the district court and this decree was affirmed by the United States Circuit Court of Appeals for the Second Circuit, from which court the case comes here on appeal.

The Circuit Court of Appeals said with reference to the issue involved that:

"The sole question presented in argument or by assignment of error is whether under the Act to Regulate Commerce, as amended June 18, 1910, it is lawful for railway and telegraph companies to observe

the terms of a contract made between them (and lawful when made) long before passage of the statute referred to."

The case of the Postal Telegraph-Cable Company, appellant *vs.* Chicago Great Western Railroad was brought in the United States District Court for the Northern District of Illinois by the Chicago Great Western Railroad Company against the Postal Telegraph Cable Company on a bill in equity praying adjudication (1st) that certain contracts between the parties, made December 26, 1888, and February 5, 1902, are lawful and binding; (2d) that certain suits at law then pending in the Municipal Court of the City of New York and in the Appellate Division of the Supreme Court of New York, between the complainant and the defendant, be stayed during the pendency of the proceedings, and permanently, and that said defendant be also restrained during the pendency of those proceedings, and permanently, from bringing further suits against the complainant for the collection of telegraph tolls, and (3d) that a mandatory injunction be entered requiring the Telegraph Company to continue to furnish the complainant the telegraphic service provided for in said contracts.

The prayers of the petition were denied and the bill dismissed by the district court. This action was reversed by the Circuit Court of Appeals, and the case remanded with instructions to grant the prayers of the bill. The Circuit Court of Appeals followed the decision of the Circuit Court of Appeals for the Second Circuit in the above case of the Western Union Telegraph Company *vs.* Baltimore & Ohio, stating that they found no additional facts that in their judgment enlarged or changed the questions for decision. From this action of the Circuit Court of Appeals for the Seventh Circuit the case was appealed to this court.

During the last term of this court, while the case of the Postal Telegraph-Cable Company *vs.* Chicago Great Western Railroad was still pending before the Circuit Court of Ap-

peals of the Seventh Circuit, a motion to advance was made in the case of the Western Union Telegraph Company *vs.* Baltimore & Ohio Railroad Company, to which motion to advance objection was made by the Postal Telegraph-Cable Company, on the ground that both cases called in question the validity of the same ruling of the Interstate Commerce Commission, and that the hearing in the Western Union case should be delayed until the Postal Telegraph-Cable Company case was before this court; in order that the two cases might be heard together; and stating that as soon as the record in the Postal case was before this court that it would gladly join in any request for an early hearing. Said motion to advance was denied by this court without prejudice.

As will appear from the foregoing, all three cases involve the same question; namely, the validity of the ruling of the Interstate Commerce Commission of March 28, 1916; and this application to consolidate them is made by virtue of subdivision 8 of rule 26 of the rules of the Supreme Court, which provides that two or more cases, involving the same question, may, by leave of court, be heard together.

Respectfully submitted,

BYNUM E. HINTON,
Attorney for Postal Telegraph-Cable Co.

No. 402.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,
v.
TONOPAH AND TIDEWATER RAILROAD COMPANY.

No. 403.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY.

No. 404.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,
v.
CHICAGO GREAT WESTERN RAILROAD.

BRIEF OF COUNSEL FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIÆ.

CHARLES W. [illegible],
Counsel for the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

INDEX.

	Page.
STATEMENT OF THE CASE	1
Principal question involved	1, 2
Procedure and decisions in the courts below	2
Postal Telegraph Co. v. *Tonopah & Tidewater Co.* No. 130	3
Operating contract	3, 4
Ruling by Interstate Commerce Commission	4, 5
Judge Lynn's decision	5, 6
Appeals	6
Western Union Telegraph Co. v. *B. & O. R. Co.*, No. 217	7
Operating contract	7–10
Rulings of the Commission	10
Admissions by the telegraph company	10
Statement that the telegraph company is acting "formally"	11
Leaves defense of the rulings to the I. C. C	11
Postal Telegraph Co. v. *Chicago Great Western R. R.*, No. 404	11
Operating contract	12
Rulings of the Commission	12
Decree sustaining rulings by Evans, Acting District Judge	13
District Court decree reversed by Circuit Court of Appeals	13

	Page.
ARGUMENT	13
Questions of law under three heads	13
Does the proviso in section 1 authorize the carriers to disregard the provisions of the act to regulate commerce?	14
Requirements of the act as affecting telegraph companies	14–16
Private carriage or transmission	16
"On line" service defined	17
Free contracting permitted	17
Public carriage or transmission	18
Governed by the act to regulate commerce	18
Services to be exchanged at public rates	18
Administrative rulings	20
Statutory construction	24
Construction of the proviso in section 1	24
Objections to free services	27
Legislative construction of the words "Exchange of services"	30
State of the law when the proviso was adopted	32
CONSTITUTIONALITY OF THE PROVISO AS CONSTRUED	35
Effect of the antipass provision upon the construction	37
CONCLUSION	40
Provisions in section 20	40

STATUTES CITED.

	Page.
Act of June 18, 1910, 36 Stat. L. 539, 546, c. 309, sec. 7	2
Act to regulate commerce:	
Sec. 1, proviso	24
Sec. 1	14–18
Sec. 3	19
Sec. 6	20
Sec. 15	19
Sec. 20	40
Sec. 22	34
Hepburn Act, June 29, 1906	20

COMMISSION'S RULINGS.

Contracts between telegraph companies and railroads for free or reduced rate transportation unlawful:	
Conference ruling 219, June 3, 1907	20
Conference ruling 305, March 13, 1911	22
Conference ruling 491, March 23, 1916	17–23

AUTHORITY CITED.

Sutherland Statutory Construction, vol. 2, 2d ed., sec. 352	24–25

CASES CITED.

	Page.
American Express Company v. *United States*, 212 U. S. 522, 534	25
Armour Packing Co. v. *United States*, 209 U. S. 56, 82	35–36
Bank for Savings v. *Collector*, 3 Wall. 495	25
Chicago, B. & Q. R. Co. v. *United States*, 209 U. S. 90	35
Chicago, I. & L. R. Co. v. *United States*, 219 U. S. 486, 496	29–35
Commonwealth v. *Kelley*, 177 Mass. 221, 58 N. E. 691	25
Holy Trinity Church v. *United States*, 143 U. S. 457, 472	27
Illinois Central R. R. v. *I. C. C.*, 206 U. S. 441	24
Int. Com. Com. v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 342	33
Int. Com. Com. v. *Goodrich Transit Co.*, 224 U. S. 194, 207	14
Judge v. *Northern Pacific Ry. Co.*, 189 Fed. 1014	35–36
Legal Tender Cases, 12 Wall. 457, 551	36
Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, 474, 475	26–35–36
Market v. *Hoffman*, 101 U. S. 112, 115	26
New Haven Case, 200 U. S. 361, 401	24
N. Y. C. & H. R. R. Co. v. *Gray*, 239 U. S. 583	35
New York, N. H. & H. R. R. Co. v. *Int. Com. Com.*, 200 U. S. 361, 401. (New Haven Case)	35
O'Keefe v. *United States et al.*, 240 U. S. 294	35
Railroad-Telegraph Contracts, 12 I. C. C. 10	21
St. Louis, I. M. & S. Ry. Co. v. *Conley*, 187 Fed. 949	36
Santa Fe Railway v. *Grant Bros.*, 228 U. S. 177, 186, 187	16

	Page.
Savings Bank v. *United States*, 19 Wall. 227	25
Texas & Pacific R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442	25
United States v. *Dickson*, 15 Peter 141, 163	25
United States v. *Erie Railroad*, 235 U. S. 513, 520	15
United States v. *Erie Railroad*, 236 U. S. 259, 270, 272. (Erie Pass Case)	24–38
United States v. *Hermanos*, 209 U. S. 337, 339	24
United States v. *Moore*, 95 U. S. 760	24
United States v. *Philbrick*, 120 U. S. 52, 59	24

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

POSTAL TELEGRAPH-CABLE COMPANY, plaintiff in error, *v.* TONOPAH AND TIDEWATER RAILROAD Company.	No. 130.
THE WESTERN UNION TELEGRAPH COMPANY, appellant, *v.* THE BALTIMORE & OHIO RAILROAD Company.	No. 217.
POSTAL TELEGRAPH-CABLE COMPANY, appellant, *v.* CHICAGO GREAT WESTERN RAILROAD.	No. 404.

BRIEF OF COUNSEL FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

STATEMENT OF THE CASE.

By order of this court these three cases are to be heard together. The principal question involved is whether railroad and telegraph companies subject to

the act to regulate commerce may, under contract, perform public or "off line" interstate transportation or transmission services for each other free or for less than the regular rates charged other shippers or senders of messages for like services. This calls for a construction of a proviso in the act of June 18, 1910 (36 Stat. L. 539, 546, c. 309, sec. 7), which reads:

> That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

The procedure in these cases differs and the operative contracts between the rail and telegraph companies are not alike in all respects, but the facts, material to a determination of the issues raised, are the same in each case. The respective contracts are set forth in the transcript of record of each case and provide in detail for the construction, maintenance, and operation of the telegraph lines upon the rights of way of the railroad companies. In the matter of construction the telegraph companies generally furnish the material and skilled labor and the railroad companies furnish the unskilled labor and right of way, and transport the laborers and material to and from points on their lines where they are needed. One or more of the wires is or are devoted exclusively to the railroad in operating its lines, with the right to the use of other wires when required; the telegraph company is then free to use its wires for commercial or public messages. The railroad company

furnishes the offices for the telegraph operators and in some cases the station agent is the telegraph operator. In some other respects, there is an exchange of services. A brief statement of each case will aid in presenting the controversy and the rulings of the courts below.

1. *The Postal Telegraph-Cable Company* v. *The Tonopah and Tidewater Railroad Company*, No. 130, is an action at law brought by the telegraph company in the Municipal Court of the State of New York to recover $7.32 charges for the transmission of interstate telegrams at the instance of the railroad company. The defendant sets up as a defense an agreement for free transmission in the operating contract between the companies. Without reviewing the evidence pertaining to the making of this contract and the manner in which it became operative between these companies, we quote the seventh article in the agreement as amended (printed record, p. 76):

> VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines, business of the railway company to the extent of twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the telegraph company from the point where any such message originates to the final destination, all such railway messages in the telegraph company's possession to be regarded as handled by them

> from point of origin to destination, and for this purpose the telegraph company will issue to such officers of the railway company as may be designated by the president, vice president, or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one half the regular rates of the telegraph company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the railway company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the railway company, the tolls upon which should properly be chargeable to such customers.

The original contract is dated December 26, 1888, and is to "continue for ninety-nine years" from its date.

The plaintiff introduced certain rulings of the Interstate Commerce Commission, which are set forth in the printed record at page 59 et seq. These rulings were made before the amendatory act of 1910 and

deal with the rights and duties of railroad companies subject to the act to regulate commerce. The Commission held:

> But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines. (Id. 62.)

Judge Lynn, of the Municipal Court of New York, gave the only written opinion in the case. It is found on page 40 of the printed record and reads as follows:

> This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to

> the facts, and hence that question of law stands out clear and distinct. It is whether the interstate commerce act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28, 1916, is constitutional under the Constitution of the United States, as applied to the contract in evidence in this case, between the plaintiff and defendant, made prior to the act of Congress of June 18, 1910, which placed telegraph companies within the interstate commerce act. In other words, could an act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the interstate commerce act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract, is unconstitutional and accordingly I direct judgment for the defendant.

The case was appealed to the Supreme Court of New York and at a hearing of appeals from the Municipal Court the judgment was affirmed and a further appeal was taken to the Appellate Division of the Supreme Court, First Department, where the decision of the Municipal Court was again affirmed. The case comes here on writ of error.

The errors assigned, set forth on pages 50 and 51 of the record, call for a construction of the proviso

in the act of June 18, 1910, and question the constitutionality of the act if the ruling of the Interstate Commerce Commission be sustained.

2. *The Western Union Telegraph Company* v. *The Baltimore & Ohio Railroad Company*, No. 217, is a suit in equity brought by the railroad company in the United States District Court for the Southern District of New York. There is attached to the bill as Exhibit A the operating contract between the railroad and the telegraph company dated October 15, 1887, to continue in force for a term of 50 years from its date. The tenth and eleventh articles of the contract read as follows (printed record, p. 29):

> Tenth. The telegraph company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and dispatch, and free of charge, the messages of the officers and agents of the railroad company, pertaining to its railroad business between all cities, towns, and places now reached by said telegraph lines on said railroads.
>
> And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the telegraph company or its subordinate companies in any of the said cities, towns, and places, and when so received shall be transmitted by the telegraph company, over said telegraph lines free of charge. And if the same for any reason of convenience

to the telegraph company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the railroad company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the telegraph company, or its subordinate companies, in the telegraph company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum, calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined. And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's railroads covered by this agreement, andshall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise, or accomodation for customers of the railroad company,

the tolls on which messages should properly be chargeable to such customers.

Eleventh. The railroad company agrees to transport, free of charge over its said railroads, on application of the superintendent or other proper officer of the telegraph company, all employees of the telegraph company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge, all poles and other material and supplies of the telegraph company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches, and acquired roads, and also material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the railroad company also agrees to transport, free of charge, the employees of the telegraph company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the telegraph company, required for the construction, maintenance, renewals, and reconstruction of other telegraph lines of the telegraph company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding ten thousand ($10,000.00) per annum, calculated at the

> current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlements to be made yearly.

The bill sets forth the rulings of the Interstate Commerce Commission, with other alleged facts, and compliance with the rulings by the Western Union Telegraph Company. The bill prays that the—

> court will determine, adjudge, and decree that said contract, "Exhibit A," is lawful and binding on the parties thereto and is still in force and effect notwithstanding the conference ruling of March 18, 1916, of said Interstate Commerce Commission and notwithstanding the action of the defendant in respect of such contract or in asserted compliance with such ruling.

It further prays for specific performance of the contract and for an injunction.

The Western Union Telegraph Company filed an answer admitting the allegations of the bill. After hearing by the court a decree was entered on February 28, 1917, granting the prayers of the bill. A written opinion was filed by Mayer, district judge. (Printed record, p. 38 et seq.) An appeal was taken by the telegraph company to the United States Circuit Court of Appeals for the Second Circuit where the decree was affirmed and the case was appealed to this court.

It should be noted in connection with these appeals that the brief filed in this court by counsel for the Western Union Telegraph Company on page 13 states:

> The telegraph company is therefore here formally assigning error in the decree, but desires the court should understand that it believes, as it has constantly insisted, that the decree below was right, but has brought the matter into this court, in pursuance of its understanding with the District Court, in order that the Interstate Commerce Commission may have an opportunity to be heard through its counsel in support of its ruling.

In this case, as is disclosed by the brief of appellant's counsel, there is no party to the record upholding the ruling of the Interstate Commerce Commission. The briefs filed by both appellant and appellee are in support of the decree entered in the District Court.

The errors assigned in this case are found on pages 60 and 61 of the printed record and call for a construction of the proviso in Section I and its application to the provisions of articles 10 and 11 in the contract between the parties.

3. *The Postal Telegraph-Cable Company* v. *Chicago Great Western Railroad*, No 404, is a bill in equity filed in the District Court of the United States for the Northern District of Illinois, Eastern Division. The bill seeks to compel the telegraph company to comply with the terms of a certain contract made December 26, 1888, between the defendant and plaintiff's predecessor and to restrain the prosecution

of certain actions at law instituted by the telegraph company to collect moneys due for services in transmitting interstate telegrams, this contract to continue for ninety-nine years from its date.

The seventh article of the contract reads in part as follows (printed record, p. 86):

> VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines business of the railway company to the extent of $10.— per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the telegraph company, and for this purpose the telegraph company will issue to said officers of the railway company as may be designated by the president, vice president, or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company, originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than $10— per mile of railway per annum the excess shall be paid for at one-half the regular rates of the telegraph company * * * .

The rulings of the Interstate Commerce Commission are set forth and compliance therewith by the telegraph company.

The District Court sustained the rulings of the Commission in an opinion rendered by Evans, acting district judge, and a decree was entered dismissing the bill. (Printed record, p. 84, et seq.) An appeal was taken by the railroad company in the United States Circuit Court of Appeals for the Seventh Circuit where the decree of the District Court was reversed, opinion by Baker, circuit judge. (Printed record, p. 108, et seq.) From this decision an appeal was taken to this court. The errors assigned in this case present the same question as is presented in the preceding case.

ARGUMENT.

The material facts being admitted, we shall discuss the questions of law involved in these cases under three heads:

First. Does the proviso authorizing "contracts * * * for the exchange of services" permit the companies to disregard those provisions of the act to regulate commerce which require the application of reasonable rates for public services, and prohibit unjust discrimination and undue or unreasonable preferences or prejudices?

Second. If the proviso is limited to those services on the line which in their nature are private, is the act unconstitutional?

Third. Does the proviso in the antipass paragraph of section 1 of the act to regulate commerce, permitting the exchange of passes and franks, affect the construction given to the proviso authorizing contracts for the exchange of services?

I.

Does the proviso authorizing "contracts * * * for the exchange of services" permit the companies to disregard those provisions of the act to regulate commerce which require the application of reasonable rates for public services, and prohibit unjust discrimination and undue or unreasonable preferences or prejudices?

Section 1 of the act to regulate commerce as amended by the act of June 18, 1910, provides:

> * * * That the provisions of this Act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act * * *.

The requirements that all rates shall be just and reasonable, and that no undue or unreasonable preferences or advantages be given by the carriers apply to all carriers subject to the act. In passing upon the application of the provisions of the Act to water carriers this court in *Interstate Commerce Commission* v. *Goodrich Transit Company* (224 U. S. 194, 207), speaking through Mr. Justice Day, said:

> Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act * * *. It may be that certain provisions of the act

> are in their nature applicable to some carriers and not to others; * * *.

This language applies with equal force to the telegraph, telephone, and cable companies brought under the act by the amendment of 1910 and justifies the ruling of the Commission, hereafter quoted, that the telegraph and telephone companies are subject to the provisions of sections 1, 3, 15, and 20 of the act to regulate commerce although other provisions of the act are not applicable to such companies.

Telegraph, telephone, and cable lines are essential instrumentalities in the operation of modern railroads. They are necessary for the transmission of orders, giving information as to track and other conditions, the movement of trains, quick communication between operating officers and employees, and general administration. Cables are required in many instances in this country where the rail line is broken by waterways and where overhead wires are impossible or impracticable. Railroad companies may construct their own telegraph lines for use in the operation of their railroad or they may, as is usually done, arrange with existing telegraph companies to construct and operate lines along their rights of way, giving the railroad companies telegraph service. Speaking upon the relation between railroad and telegraph companies this court in *United States* v. *Erie Railroad* (235 U. S. 513, 520), speaking through Mr. Justice McKenna, said:

> It will be observed that while the companies in many respects are independent, they are

> also, in some respects at least, dependent. The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company, would have to do.

Because of this relation an exchange of services is necessary and proper to a certain extent.

There are two classes of work performed by common carriers:

First. Private carriage or transmission in constructing, repairing, and operating their properties. This involves the carriage of persons and property by the railroad companies and the transmission of messages by the telegraph companies, but it is not a public service by a common carrier. This is clearly stated in *Santa Fe Railway* v. *Grant Bros.* (228 U. S. 177, 186, 187), where this court, speaking through Mr. Justice Hughes, said:

> In constructing, improving or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but of course is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances and supplies, required by the contractor for the purpose of the construction or improvement, to or from

> the point on its line where the work is to be done, is merely incidental to the work itself. The cost of such haulage is obviously an item of expense which must be taken into account in fixing the terms of the construction contract, and in providing for it over its own line the railroad company may adjust the matter with the contractor as it sees fit. If the railroad company did the work directly it would have to take its employees and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree.

Considering the relation between a railroad and a telegraph line, the existing contracts under consideration in so far as they provide for "on line" free service or the exchange of services in the construction, maintenance, and operation of the railroad and the telegraph line, to the extent that the telegraph line is coterminous with the railroad, are unobjectionable. The Commission therefore held in conference rule 491, as it had stated in former rules—

> that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contracting railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier.

This also applies to the transmission of messages on the line by the telegraph company in connection with the construction, maintenance, and operation of the railroad. The proviso under consideration permitting contracts for the exchange of services has full operation in this large field of private service.

Second. Public carriage of persons and property and the transmission of messages for the public. The Government regulates this service by requiring reasonable and uniform charges, and prohibits favoritism, unjust discrimination and undue or unreasonable preferences. As to these public or commercial services, where the companies act as common carriers, we contend that the proviso, permitting contracts for the exchange of services, is inoperative, except it may permit the offsetting of accounts at settlement periods, the balances only being paid in money.

STATUTORY PROVISIONS.

The provisions of the act to regulate commerce as amended which dominate the carriers and all other provisions of the act are the following:

Section 1:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

Section 3:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15:

> That whenever, * * *, the Commission shall be of opinion that any * * * rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be

charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * *.

Section 6, applying to the railroads, provides for the filing, printing, and posting of schedules of rates, fares, and charges, and prohibits the charging, demanding, collecting, or receiving a greater or less or different compensation than the published rate. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act.

ADMINISTRATIVE RULINGS.

These rulings cover two periods: (1) From the adoption of the Hepburn Act, June 29, 1906, to the amendment of June 18, 1910, and (2) the period subsequent to the amendment of 1910. During the first period only the railroads were subject to the act and the regulatory power of the Commission. The regulations adopted in 1907, therefore, were made in reference to the conditions then existing. These conference rulings are duly published by order of the Commission and the references are to Conference Rulings Bulletin No. 7, issued August 1, 1917.

June 3, 1907.

219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.—(*a*) In its decision on the petition of the Western

Union and Postal Telegraph Companies, in *Railroad-Telegraph Contracts*, 12 I. C. C. 10, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (Modified by ruling 491. See also rulings 95a, par. 2, 161, and 364; see also amendatory act of June 18, 1910, interpreted in ruling 305.)

(*b*) This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such relation-

ship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (Amended by ruling 491. See also ruling 305.)

The pertinent parts of rule 305 hold:

March 13, 1911.

305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.—(*a*) Each and every telegraph and telephone company which transmits messages over its line or lines from a point in one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, is subject to the provisions of the act.

* * * * *

(*d*) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof, requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the

provisions of said section. (See rulings 95a, par. 2, 161, 219, and 364.)

(*e*) Such telegraph and telephone companies subject to the act are also governed by the provisions of section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of section 15 of the act, and also of section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission.

March 23, 1916.

491. EXCHANGE OF SERVICES UNDER CONTRACTS BETWEEN RAILROADS AND TELEGRAPH, TELEPHONE, OR CABLE COMPANIES.—Upon inquiry whether under section 1 of the act a railroad may contract with a telegraph company to transport the latter's property, either for use on the railroad's line or elsewhere, at a rate different to the regularly published rate for such transportation: *Held*, That such an exchange of services may lawfully be made only upon the basis of the legally established rates of the railroad and on the basis of the fixed charges of the telegraph company regularly exacted of other customers for similar services; except that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contract-

> ing railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier. (Amends and modifies ruling 219 and cancels ruling 364; see also ruling 305.)

A contemporaneous construction of a statute by those upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. (*United States* v. *Erie Railroad*, 236 U. S. 259, 270; *New Haven case*, 200 U. S. 361, 401; *United States* v. *Hermanos*, 209 U. S. 337, 339; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Illinois Central R. R.* v. *I. C. C.*, 206 U. S. 441; *United States* v. *Moore*, 95 U. S. 760.)

STATUTORY CONSTRUCTION.

Coming now to the construction of the proviso in section 1—

> That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.

We call attention to rules of statutory construction which are cogent in determining the extent of the application of this proviso:

> The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter.

(*Bank for Savings* v. *The Collector*, 3 Wall. 495; *Savings Bank* v. *United States*, 19 Wall. 227; *Commonwealth* v. *Kelley*, 177 Mass. 221, 58 N. E., 691.) It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section it does not apply to others unless plainly intended. (*Sutherland Statutory Construction*, vol. 2, 2d ed. sec. 352.)

In *American Express Company* v. *United States* (212 U. S. 522, 534), this court speaking, through Mr. Justice Day, said:

> There is no doubt that a proviso has not infrequently been the means of introducing into a law independent legislation, notwithstanding it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used. (*United States* v. *Dickson*, 15 Peter, 141, 163 * * *.)
>
> While, therefore, a proviso may sometimes be construed as extending rather than limiting legislation, each statute must depend upon its own terms, and a proviso will be given such construction as is consistent with the legislation under construction.

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Company* (204 U. S. 426, 442), this court, construing the ninth and twenty-second sections of the act to regulate commerce giving a shipper the right to bring suit in court to obtain a relief from an alleged

unreasonable freight rate, and speaking through Mr. Justice White, now the Chief Justice, said:

> True it is that the general terms of the section when taken alone might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. * * * . In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

In *Louisville & Nashville R. Co.* v. *Mottley* (219 U. S. 467, 475), this court, construing the words forbidding a carrier to receive "a greater or less *or different* compensation," speaking through Mr. Justice Harlan, said:

> We must have regard to all the words used by Congress, and, as far as possible, give effect to them. (*Market* v. *Hoffman*, 101 U. S. 112, 115.) * * *

and held that only money could be accepted in payment for transportation. In this the court

sustained the rulings of the Interstate Commerce Commission in that case.

In *Holy Trinity Church* v. *United States* (143 U. S. 457, 472), this court, passing upon a technical construction of a statute which if accepted would carry the act beyond its purpose, and speaking through Mr. Justice Brewer, said:

> It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute.

Turning now to the proviso under consideration, we find it placed in section 1, which does not deal with the subjects of discrimination in charges or with uniform rates enforceable in all cases of public or commercial transportation. To give the effect contended for, namely, that telegraph companies may contract with railroad companies *for free transportation or transportation at less than the published rate*, the proviso must be carried over into and annul, as to these carriers, the provisions of sections 3, 6, and 15. There can be no question that the transportation of materials and men "off the line" of the railroad is public or commercial transportation as to which the law prohibits unjust discriminations and undue preferences, and enforces the application of the published rate by very severe penalties. Transmitting messages for the railroad company, off the line of the railroad is also public or com-

mercial service the rendering of which by the telegraph company must be without unjust discrimination or undue preference. Under the construction contended for by the railroad companies and the Western Union Telegraph Company, sections 3, 6, and 15 become absolutely inoperative as to these companies when either one is performing for the other purely public or commercial service. The railroad company may have all of its commercial telegraph business performed free or at less than the reasonable and usual charge made against other senders of messages. The telegraph company may ship its millions of poles and hundreds of carloads of material from one end of the country to the other (for similar contracts are made with all carriers) free of charge. The whole purpose of the act regulating public service is destroyed as to this public business by these carriers. Unjust discrimination and undue preference are carried to the fullest possible extent by their agreement and they are placed wholly outside of the regulating control of the statute. This free transportation, enormous in quantity, increases the operating expenses of the railroad company, which must be made up by increased charges to the public. It is no answer to this to say that the railroad company gets its telegraphing free and therefore saves that operating expense. There is no evidence to show that the services so exchanged are at all equal when measured by the public rates; if they are equal no loss is occasioned by exchanging services at the public rates. If the public transporta-

tion services do not equal the public telegraph service, measured by the public rates, or vice versa, then the public must make up the loss in higher rates, to enable the losing company to do this business.

Section 6 provides "the provisions of this section shall apply to all traffic, transportation, and facilities defined in the act." If Congress intended to exclude the railroad companies from the provisions of this act in their contract relations with the telegraph companies, the proviso in section 1 should have been placed immediately after this provision in section 6.

When we consider the words in the proviso they do not compel a construction that Congress intended that these companies could contract *as to the amount* of the rates or charges to be made by one to the other for public or commercial service; at most they permit an exchange of "public services" *measured by the public rates*, any balance to be paid, on settlement, by the debtor company.

In *Chicago, I. & L. R. Co.* v. *United States* (219 U. S. 486, 496) there was an agreement to exchange transportation for advertising at the regular rates, that is to say, transportation was to be at published rate and advertising at the regular rate charged other customers. This was an exchange of services at established rates, but this court following the *Mottley case*, speaking through Mr. Justice Harlan, said:

> The legislative department intended that all who obtain transportation on interstate

> lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends can not be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money.

If these companies had been permitted to contract for an exchange of services it would not follow that such a provision permitted them to exchange services on any other basis than the regular charges to all customers for the services rendered. Where the rates of common carriers are fixed by public authority and are payable in money, unless there be an exception in the legislation, it follows that if the proviso in section 1 be extended to public services, the right to contract for the exchange of services goes no further than allowing the companies to offset their accounts for services measured by the public rates, the company against whom the debit balance appears paying that amount in money to the other company. This is a change in the law as it stood when the act was passed—the law requiring *all* payments to be made in money.

While this proviso was not discussed in either House of Congress, having been inserted in conference, there was a debate on the question of permitting an exchange of transportation for adver-

tising. In the Congressional Record of April 29, 1910, (p. 5582), the following discussion appears.

Mr. Bartlett of Georgia offered an amendment providing in effect that common carriers might exchange transportation of passengers for advertising.

> Mr. HOBSON. The gentleman will notice that there is no authority vested in the Interstate Commerce Commission or in anyone else to fix the amount of transportation for a given amount of advertising.
>
> Mr. MANN. *It will be at the current rate.*
>
> Mr. HOBSON. That must open the door for railroads to give transportation where there is not necessarily any advertising value in return. [Applause.] And so we get right back to the old idea of an opportunity for the railroads to give favors. [Applause.] Will the gentleman tell me further whether he sees any way in which that could be regulated?
>
> Mr. BARTLETT of Georgia. I do not think this amendment authorizes that deduction to be drawn from it and I *do not think the railroads would or could, except in violation of the law, furnish transportation at a greater or less price than that fixed by the law or by the railroad commission.* [Italics ours.]

Mr. Mann was the chairman of the Committee on Interstate and Foreign Commerce of the House, well versed in the law, and all participating in the discussion understood the subject. It is very clear, therefore, that in discussing that proposed amendment for

"exchange of services," there was no thought that such a provision would give the parties the right to contract for less than the established rates for transportation and the current rates for advertising, although the latter might be difficult of ascertainment. This shows that the legislators in the House took the same view of the words "exchange of services" as applied to public services as the Commission did in its rulings. What we insist upon is that the language of the proviso, in view of the state of the law and controversies which had arisen, does not authorize the companies to contract in reference to the *amount* of their rates or charges for common carrier services, or for a *reduction* of the published railroad rates or the regular public telegraph rates, when exchanging common carrier services; but for all common carrier services the published and public rate must be charged by each company, respectively.

That the construction insisted upon by the railroads and the Western Union Telegraph Company results in unlawful discrimination between shippers and users of these services is apparent. The services are free up to a very large maximum in each case and one-half rates are to be charged above the maximum. No provision is made for measuring these services if the public rates are to be disregarded, and there is no way of ascertaining which of these companies is advantaged and to what extent. If the payment in the manner provided in the *Mottley* and the *Muncy* cases produced a discrimination between

those parties and the public that was required to pay money, certainly in these cases where the payment is in unmeasured services, there is a discrimination.

But it is said this construction is of advantage to the public because it furnishes cheap telegraphing to the railroads and cheap transportation to the telegraph companies. This argument could have been as well made in the *Fuel Coal* case where a lower rate had been put in for coal intended for railway consumption than was charged for commercial coal. This case had reference to off line service. In that case (*Int. Com. Com.* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 342) this court, speaking through Mr. Justice McKenna, said:

> * * * Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before or their attitude and interest after transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, *but the relation of a railroad to its patrons, who are entitled to equality of charges* * * *. [Italics ours.]

If railroads may not give to each other concessions from the public rates, on what theory or reason should telegraph companies and railroads dealing with each other be permitted to make varia-

tions in their rates for services when such charges are required by law to be the same to the public? If railroads must pay full transportation charges for off-line service on other roads, why should not a telegraph company pay the public rate? If a railroad must pay the public rate for public services by another railroad, why should it not pay the regular rate to the telegraph company? Of course, if the act of Congress compels such a conclusion we must yield, but where the language in the act, considering its location, its relation to the whole act, and its wording, does not compel such a conclusion, what reasons are there for the court to give it such effect by construction?

Section 22 expressly provides that nothing in the act shall prevent the carriage of property free or at reduced rates for the United States. But not a soldier is carried free and no one has contended that the United States was entitled by reason of that clause in the act to have its property carried free of charge and thereby cast the burden of that transportation upon the railroads and the public. Is a telegraph company to have greater privileges over the railway lines of the country than the United States Government, or rail carriers, or other shippers? We can see no reason for extending the effect of this proviso beyond the position which it occupies in the act or its wording entitles it to.

II.

If the proviso is limited to those services on the line which in their nature are private, is the act unconstitutional?

Justice Lynn of the Municipal Court of the City of New York in his opinion in *Postal Telegraph-Cable Company* v. *Tonopah and Tidewater Railroad Company*, No. 130, held, "that that provision of the interstate commerce act as construed by the Interstate Commerce Commission which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract is unconstitutional." This judgment was affirmed on the two appeals in the Supreme Court of New York. This opinion denies the constitutional right of Congress, in the exercise of its regulatory power, to "abrogate the so-called free telegraph service" provided for in the contract. This question has been determined by this court in so many cases that a reference to the decisions seems all that is necessary to show the error in the position taken by the court below in this case.

In the exercise of its power to regulate commerce and in the regulation thereof, existing contracts, perfectly lawful when made, may be suspended by the adoption of Federal law with which they are inconsistent. (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467; *New York, N. H. & H. R. R. Co.* v. *Int. Com. Com.*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Chicago, B. & Q. R. Co.* v. *United States*, 209 U. S. 90; *Chicago, I. & L. Ry. Co.* v. *United States*, 219 U. S. 486; *New York Central & H. R. R. Co.* v. *Gray*, 239 U. S. 583; *O'Keefe* v. *United States et al.*, 240 U. S. 294; *Judge*

v. *Northern Pacific Ry. Co.*, 189 Fed. 1014; and *St. Louis, I. M. & S. Ry. Co.* v. *Conley*, 187 Fed. 949.)

In the *Mottley Case*, supra, Mr. Justice Harlan, speaking for the court, at page 474, said:

> It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration can not control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit.

In *Armour Packing Company* v. *United States* (209 U. S. 56, 82), this court, construing the effect of the act to regulate commerce upon an existing contract, speaking through Mr. Justice Day, said:

> But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce and such considerations of inconvenience or hardship address themselves to the lawmaking branch of the Government. * * *.
>
> It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

Long before the above cases were decided it was said in *Legal Tender Cases* (12 Wall. 457, 551), that:

> As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so con-

> tracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.
>
> * * * A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless.

These cases, it seems to us, entirely dispose of the question and sustain the constitutionality of the law as construed by the Interstate Commerce Commission, although its ruling does abrogate that part of the contract which provides for free service off the line.

III.

Does the proviso in the antipass paragraph of section 1 of the act to regulate commerce, permitting the exchange of passes and franks, affect the construction given to the proviso authorizing contracts for the exchange of services?

We claim that the provision in the antipass paragraph of section 1 has no relation with the proviso authorizing contracts for the exchange of services between telegraph and railroad companies. There has always been a certain amount of free services in the carriage of persons by railroad and in the sending of messages by telegraph which has been and is regarded as proper in the conduct of the public service. There were great abuses in this branch of the service resulting in overburdening the railroads and the public. Congress, therefore, restricted the grant-

ing of passes to specified classes of persons. The act to regulate commerce prohibits free passes and free transportation to persons not included in the excepted classes enumerated in section 1. The classification includes persons engaged in charitable and eleemosynary work, indigent, and destitute persons, persons in charge of shipments of live animals, employees of the postal, customs, and immigration departments of the Government, and officers, agents, and employees of the carriers, and their families. Passes are classified into trip, monthly, and annual passes. The issuance of passes, within the classification, rests with the carrier, but does not extend beyond an annual pass under the custom. The carrier may abuse this privilege, but if the practice is confined to the sphere well established and well known to Congress, it is not likely to be carried to an unreasonable excess and is under control from year to year. This court, speaking upon the subject in the *Erie Pass case, supra*, page 272, said:

> Congress certainly had no such view and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. * * * It has its justification in a strictly business policy, and instead of being a burden upon the resources of the company, it is an aid to them.

When this privilege was extended to the giving of franks by the telegraph companies, it was undoubtedly understood that the issuance of franks was to be in conformity with the practice of the rail-

carriers in issuing passes, a privilege to be exercised freely in each case and not exceeding an annual or yearly frank.

Looking at the antipass provision therefore in the light of the history of the practice and the classification of passes, it is evident that nothing in this provision can justify an agreement for passes extending over a period of fifty or ninety-nine years. If the court were to sustain the contracts under consideration as valid contracts, because of the pass provision then the agreement to issue passes for fifty years or ninety-nine years would be an obligation that would bind not only the companies but their successors, and if the Government, for instance, should take over the telegraph lines and operate them under Government ownership, the provision in these contracts would be binding and could only be eliminated by condemnation. There is no evidence, or reason to believe, that Congress, in authorizing the issuance of passes and franks in the customary way, intended to authorize these companies to enter into contracts that should bind the companies to issue passes and franks to officers, employees, etc., of each company, respectively, for fifty or ninety-nine years.

This privilege of issuing passes and franks granted by the act must stand by itself and be considered as a grant to be exercised only in accordance with the prevailing custom, a custom which prevents abuses because of the interest of the carriers in the free exercise of the right to grant or refuse such passes at any time.

It may well be asked why Congress extended the privilege of granting passes and franks to these carriers, if under the proviso in controversy in this case they had the full right to grant free services under the contracts they were authorized to make. If, under that proviso, they have the right to give free public and commercial transportation and transmission to the officers, agents, and employees of the companies, they did not need an authority to give passes and franks. This tends to show that Congress understood that such right of contract for exchange of services did not include public or commercial transportation or transmission, and therefore the extension of the pass and frank privilege was necessary.

CONCLUSION.

Section 20 of the act to regulate commerce provides for annual reports by the carriers:

> Such annual reports shall show in detail * * * the earnings and receipts from each branch of business and from all sources; * * *; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet.

These annual reports give information upon which Congress may legislate and facts which the Commission may consider in determining rates. Under these contracts there is a very large volume of transportation for the telegraph companies and a very large volume of messages for the railroad companies,

which are public services by common carriers, the receipts from which are not now shown in the annual reports of these companies. The only way in which these revenues can appear is by exchanging the public services on the basis of the public rates; then the rates of the railroad companies for transportation would be included in their receipts and the amount received by the telegraph companies would be covered by their reports. The purpose of these reports, among other things, is to show total receipts at public rates for public services. The enforcement of the ruling of the Commission is the only way in which these facts as to this exchange business will be made to appear in the reports of total revenues.

Following the rule of construction heretofore adopted by this court and taking into consideration the purposes of the act to regulate commerce, the portion of the act in which the proviso in controversy is placed, and the strict wording of the proviso, we submit that the administrative ruling of the Commission should be sustained.

Respectfully submitted.

CHARLES W. NEEDHAM,
Counsel for Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

O

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 30, 1917.

(26,021)

(26,021)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 554.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the District Court of the United States for the Southern District of New York	1	1
Petition for allowance of appeal and order	1	1
Bill of complaint	3	2
Exhibit A—Agreement, dated October 15, 1887	41	25
Answer	59	36
Decree	62	37
Opinion of court	64	38
Assignment of errors	88	53
Citation	90	54
Stipulation that record contains all papers and waiver of praecipe	91	55
Stipulation waiving bond	92	55
Clerk's certificate	93	56
Opinion	94	56
Decree	99	58
Petition for appeal	101	58
Order allowing appeal	103	59
Assignment of errors	105	60
Bond	109	62
Clerk's certificate	115	68
Citation and service	116	69

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1917.

a United States Circuit Court of Appeals, Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-Appellee,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 5, 1917. William Parkin, Clerk.

1 *Petition for Appeal and Order Granting Same.*

United States District Court, Southern District of New York.

In Equity, No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

To the Honorable Martin T. Manton, District Judge and one of the Judges of the above named Court, Presiding therein:

The above named defendant, The Western Union Telegraph Company, conceiving itself aggrieved by the order and decree made and entered by the above-named Court in the above entitled cause under date of February 28th, 1917, wherein and whereby it was ordered, adjudged and decreed that a certain contract dated October 15th, 1887, between complainant and defendant, a copy of which is attached to the bill of complaint herein as Exhibit A, is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions notwithstanding the Conference
2 Ruling of March 18th, 1916, of the Interstate Commerce Commission; that defendant specifically perform said contract; that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract; and that the provisions of the Act to Regulate Commerce, as amended June 18th, 1910 (U. S. Comp. Stat. § 8563, subd. 3) authorizes the making of contracts, or the continued performance of contracts theretofore made, between the complainant railroad company and defendant telegraph company, by the terms of which said com-

panies agree to exchange services upon bases other than their regular tariff rates, does hereby appeal from the said order and decree of February 28th, 1917, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

RUSH TAGGART,
Solicitor for Defendant.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court, this 2d day of March, 1917.

MARTIN T. MANTON,
District Judge and one of the Judges of said United States District Court, Presiding Therein.

3 *Bill of Complaint.*

In the District Court of the United States for the Southern District of New York.

In Equity.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant.

Bill of Complaint.

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Your orator, The Baltimore & Ohio Railroad Company, a corporation of the State of Maryland, brings this its bill of complaint against Western Union Telegraph Company, a corporation of the State of New York, and says:

I. That your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, is a citizen and resident of said State and has its principal place of business in the City of Baltimore in said State.

II. That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, is
4 a citizen of said State and has its principal place of business in the Borough of Manhattan, City of New York in said State, and is a resident of the Southern District of New York.

III. That this cause is one wholly between citizens of different States; that the subject matter thereof and the amount in contro-

versy is of the value of more than $3,000, exclusive of interest and costs, and that this cause arises under and involves the construction of a law regulating commerce, to wit, "An Act to regulate commerce," approved February 4, 1887, commonly known and hereinafter referred to as the "Interstate Commerce Act."

IV. That your orator is a railroad corporation and controls and operates under lease, ownership or otherwise upwards of nine thousand miles of railroad including the following lines of railroad:

From Philadelphia, Pa., to Baltimore, Md.; from Baltimore, Md., to Washington, D. C.; from Baltimore, Md., westward through the States of Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois, and reaching among others the cities of Pittsburgh, Wheeling, Cleveland, Columbus, Cincinnati, Chicago and St. Louis. That your orator also controls by stock ownership subsidiary companies and that the trains of your orator are operated, under certain agreements, over the lines of said subsidiary companies and over the lines of other railroad companies between Philadelphia and New York City.

V. That under date of October 15, 1887, a written contract was entered into between defendant and your orator, for itself and for all the railroads which were then owned, leased or controlled by your orator or which might thereafter be owned, leased or controlled by it during the continuance of said contract, a copy of which contract is hereto annexed, marked "Exhibit A," and made part of this bill.

That by the terms of said contract it was provided, among other things, as follows (your orator being referred to as the "Rail-
5 road Company" and the defendant as the "Telegraph Company"):

In the second paragraph thereof, that certain telegraph lines, therein described as "exclusive railroad wires," should be deemed to include the necessary instruments, switches, local batteries, loops and connections, as then located, arranged and used on said wires and as necessary to continue in operation the existing effective telegraphic circuits between the several stations and offices of the Railroad Company in the various cities, towns and places on the routes of the railroads then owned, leased, operated or controlled by the Railroad Company, and also to include one wire between Philadelphia and New York City, together with the local wires in New York City then connecting the various offices and piers of the Railroad Company as then located and arranged and as more fully shown in a schedule attached to said contract.

In the third paragraph thereof, that the Railroad Company was to retain the ownership of said "exclusive railroad wires."

In the fourth paragraph thereof, that the Telegraph Company agreed to maintain, repair and construct, at its own cost, all the telegraph lines specifically covered by said contract and more particularly shown in a schedule thereto annexed, including said "exclusive railroad wires" and such additional wires as either the Telegraph Company or the Railroad Company might place thereon, the Railroad Company, however, to furnish the necessary unskilled labor

for such maintenance, repairs and reconstruction and the necessary wire and material, not including brackets and cross-arms, for the maintenance, repair and reconstruction of said "exclusive railroad wires"; that said unskilled labor should not include either foremen, linemen, climbers, framers, or any other laborers who require special skill in connection with telegraph construction and main-
6 tenance in order properly to perform the service, but should include all labor necessary to dig holes and set, re-set and handle poles and other materials; that the Telegraph Company should not furnish any tools required in connection with such work, and that the location of any poles, wires or cables upon the right of way or property of the Railroad Company should from time to time be changed thereon in such manner as the officers of the Railroad Company might direct, so as not to interfere with the operations of the railroad, the Telegraph Company furnishing the skilled labor and the Railroad Company the unskilled labor for such work.

In the fifth paragraph thereof that the Railroad Company shall have the right to acquire from the Telegraph Company, or to erect, additional "exclusive railroad wires" upon the telegraph lines covered by the contract, the Railroad Company paying the cost of wire insulators and other material, not including brackets and cross-arms, and of direction and equipment, and where any such wire should be laid in cable the Railroad Company should be charged only the pro rata cost, with provision for sharing expense of relocation of lines; that the Railroad Company should not be required to furnish any labor in connection with lines not upon its right of way and that the Telegraph Company should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad Company in the cities and towns along its route, and also in the Cities of New York and Brooklyn, where the Telegraph Company had facilities therefor, and that if the Telegraph Company should have underground conduits available for reaching the Railroad Company's offices, stations and buildings, the Telegraph Company should furnish the Railroad Company such connecting wires as it might be able to supply in said conduits upon payment by the Railroad Company of the entire cost of the wire and of placing the same in the conduits and the pro
7 rata cost of construction or rental and maintenance of the conduits.

In the sixth paragraph thereof, that the Telegraph Company should furnish free of cost the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and should grant to the Railroad Company for use upon the railroad wires the free use of all telegraphic patents then or thereafter owned or used by the Telegraph Company or its subordinate companies, for the general telegraph business, except that any payments which the Telegraph Company might be required to make on account of such free use to any minority interests in subordinate companies should be charged to the Railroad Company, and that the Railroad Com-

pany should furnish all instruments, local batteries, stationery and other material for railroad business.

In the seventh paragraph thereof, that the railroad wires should be used only by the Railroad Company for its railroad business and should not be used for the transmission of any commercial or public telegraph business for tolls except that where there was but one wire it might be used jointly by the Telegraph Company with the Railroad Company, important railroad messages directing the movement of trains having precedence, until such time as in the judgment of the President of the Railroad Company such joint use might be detrimental to the business of the Railroad Company, whereupon the Telegraph Company should erect an additional wire for commercial business; that in all other cases the railroad wires might be used from time to time by the Telegraph Company jointly with the Railroad Company, with the Railroad Company's assent, when not in use for railroad business; that whenever the railroad wires should become disabled the Railroad Company should
8 have the right to take and use jointly with the Telegraph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires had been effected and the circuits restored, but that the through commercial wires or circuits should not be subject to such use by the Railroad Company except in cases of extreme emergency.

In the eighth paragraph thereof, that either party might establish and maintain telegraph stations at such places on said railroads as it might deem necessary; that at all telegraph stations of the Railroad Company it should furnish operators at its own expense; that its operators and other employees acting as agents of the Telegraph Company should receive, transmit and deliver exclusively for the Telegraph Company such commercial or public messages as might be offered and should charge the tariff rates of the Telegraph Company thereon, and should render to the Telegraph Company exclusively monthly statements of such business and full accounts of all receipts therefrom, and pay all of such receipts to the Telegraph Company in such manner and at such times as it might direct, but that in the transaction of all such telegraph business said operators and all other employees should be held to be only the agents of the Telegraph Company and should conform to all rules and regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free, and should not, without the consent of the Telegraph Company, transmit over the lines covered by said contract, any free messages except those therein provided for; that whenever the number of paid and collect messages sent from any railroad office should amount to $3,000 or more in any one year, thirty words of press matter being counted as one message, the Tele-
graph Company should thereafter provide an operator for
9 such office so long as said messages amounted to said number, and said operator, acting as the agent of the Railroad Company, should attend to the telegraph business of the Railroad

Company without charge so long as one operator could attend to the telegraph business of both parties; that no employee of the Railroad Company should while in its service be employed in the transaction of commercial or public telegraph business for any party other than the Telegraph Company, and that the Telegraph Company should have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or telegraph business as against any other party.

In the ninth paragraph thereof, that if the Telegraph Company should elect to establish an office in a station building of the Railroad Company, the latter should, if convenient, provide office room therein and light and fuel therefor, free of charge, and if at such station one person could attend to the telegraph business of both companies the operator of the Telegraph Company at such office, acting as agent for the Railroad Company, should attend to the telegraph business of the Railroad Company without charge and conform to the rules of the Railroad Company applicable thereto; that whenever the telegraph business of both companies at any office where the Telegraph Company furnished the operator should become so large as to require more than one operator, the Railroad Company should employ and pay its own operator.

In the tenth paragraph thereof, that the Telegraph Company should receive and transmit from said lines along said railroads, in the order in which they and other messages should be filed with it, and should deliver with promptness and despatch and free of charge the messages of the officers and agents of the Railroad Company pertaining to its railroad business, between all cities and towns and places then reached by said telegraph lines on said railroads; that such messages should be received at and delivered from any of the offices of the Telegraph Company or its subordinate companies in any of said cities, towns or places, and when so received, should be transmitted by the Telegraph Company over said telegraph lines free of charge, and that if the same for any reason of convenience to the Telegraph Company should be transmitted by other lines to the place of destination, no charge should be made therefor; that the Telegraph Company should issue to such officers of the Railroad Company as might be designated by the President or other authorized officer of the latter, annual franks authorizing the free transmission of messages relating strictly to railroad business of the Railroad Company originating at and destined to points on the lines then or thereafter owned or operated by the Telegraph Company or its subordinate companies in the Telegraph Company's general telegraph system beyond or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the regular day rates of the Telegraph Company between the points at which said messages should originate and the points to which they might be destined; that the Railroad Company should pay to the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount, settlements to be made yearly; that the free telegraphic service provided for in said contract should apply only to the transmission of messages concerning the

operation and business of the Railroad Company's railroads covered by said contract, and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

In the eleventh paragraph thereof, that the Railroad Company should transport free of charge over its railroads, on application of the Telegraph Company, all employees of the latter when
11 traveling on its business or engaged in its work along said railroads, and transport and distribute free of charge all poles and other material and supplies of the Telegraph Company for the construction, maintenance, renewal and reconstruction of said telegraph lines covered by said contract, along said railroads, and all such additional wires as might be erected on said telegraph lines and of the lines and wires provided for by said contract on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance and operation of the offices of both parties to said contract upon said telegraph lines at places along said railroads; that the Railroad Company should transport free of charge the employees of the Telegraph Company when traveling on its business or engaged in its work, and the poles and other materials and supplies of the Telegraph Company required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company other than those above referred to, whether on or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the current transportation rates of the Railroad Company, and that the Telegraph Company should pay to the Railroad Company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount, settlements to be made yearly.

In the twelfth paragraph thereof, that the Telegraph Company should pay to the Railroad Company the sum of $60,000 per annum, in equal installments of $5,000, at the close of each month during the continuance of the contract, accounting from October 15, 1887.

In the thirteenth paragraph thereof, that the Railroad Company should not be responsible for and the Telegraph Company should save it harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried
12 free or at half rates over said railroads under said contract, whether such loss or damage should arise from the neglect of said Railroad Company or its employees or otherwise, and should likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company and on account of any other public telegraph business, and that the Telegraph Company should not be responsible for and the Railroad Company should indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure, delay

or default in the transmission or delivery of any and all messages sent for the Railroad Company under said contract.

In the fourteenth paragraph thereof, that the contract should not have the effect of creating a covenant of quiet enjoyment on the part of the Railroad Company in favor of the Telegraph Company, as against the owner of the fee of the land over which the Railroad Company or any of its subordinates might have the right of way, nor as against the power of eminent domain on the part of any other companies possessing it by grant from any State or the United States, and that neither party should have any claim for damages by reason of any excess or defect of corporate or legal authority to make such contract or any part thereof.

In the fifteenth paragraph thereof, that the provisions of said contract should apply to any new extensions or branches built or other railroads acquired by purchase, lease, ownership by stock or otherwise, by the Railroad Company, and to the telegraph lines thereon, to the same extent as if such lines and railroads had been originally included in said contract, and that if there should be no telegraph line on any such roads, then the Telegraph Company should furnish material and construct one thereon and maintain, repair and reconstruct the same, the Railroad Company furnishing the un-
13 skilled labor therefor; that the Telegraph Company should set apart on any such railroads, for the Railroad Company's business, one exclusive railroad wire, and that if there should be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road, then that there should be set apart for the use of the Railroad Company such exclusive railroad wire or wires thereon as might have been previously used for railroad business exclusively; that if the Railroad Company should acquire a telegraph line on any such road, the Railroad Company should sell and the Telegraph Company should purchase such telegraph line on a valuation to be agreed upon, based on the cost of constructing and equipping a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment; that if the parties could not agree on such valuation the same should be fixed by arbitrators to be appointed as provided in said contract; that upon all such extensions, branches and leased, controlled or thereafter acquired roads, the Railroad Company should be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of paragraph Tenth of said contract on the railroads originally covered by said contract, and that the $10,000 per year limit of free telegraphic service, as provided by the second clause of said paragraph Tenth, should be increased $6 per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled or thereafter acquired roads; that the Telegraph Company should be entitled to free transportation service for employees, poles and other material and supplies, to the same extent, for use thereon and in the same manner as provided by the first clause of paragraph Eleventh of said

contract, and that the $10,000 per annum limit for free trans-
14 portation provided for by the second *class* of said paragraph Eleventh should be increased $6 per annum per mile of such road occupied as aforesaid.

In the sixteenth paragraph thereof, that the Railroad Company, so far as it legally might, granted and covenanted and agreed to assure to the Telegraph Company the exclusive right of way, on, along and under the lands, roads and bridges of the Railroad Company and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon said existing lines of poles and any renewals thereof upon said railroads, and also the right to construct one additional line of poles and wires or an underground line, upon, along or under said railroad as the Telegraph Company might deem expedient, but that the location of any such additional line of poles and wires or underground structures should be made in such way as not to interfere with the operations of the Railroad Company and at such places on the right of way or lands of the Railroad Company as should be designated by the proper officer of the Railroad Company; that the Railroad Company would clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for in said contract so far as it legally might, that the Railroad Company would not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or any telegraph or telephone line in competition with the lines or business of the Telegraph Company, except for the Railroad Company's current legal rates, nor would it furnish for any competing line and facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute its material thereon at other
15 than regular stations, so far as much refusal and limitation of transportation might be lawful, but that the Railroad Company should not be required to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than the telegraph lines then existing and renewals thereof, upon said railroads and the additional wires that might be placed thereon and the lines provided for on extensions, branches and acquired roads.

In the seventeenth paragraph thereof, that the term "subordinate companies" should be deemed to include all companies controlled by ownership of stock, lease, contract for operation or in any other manner, by either party, and that the term "telegraph line" should be deemed to include the line of poles, wires, cables, batteries connected therewith and other devices necessary for efficient telegraphic operation.

In the eighteenth paragraph thereof, that the telegraph lines covered by said contract should form part of the general telegraphic system of the Telegraph Company and be controlled and regulated by it, and that it should fix and determine all tariffs for the trans-

mission of messages and of connections with other lines and interests; that no wire then or thereafter owned, leased, controlled or used by the Railroad Company should at any time be used or employed directly or indirectly in competition with the Telegraph Company or by or for any party other than the Railroad Company and the Telegraph Company, and that the Railroad Company should not at any time during the continuance of the contract engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of the contract.

In the nineteenth paragraph thereof, that the management and control of the railroad employees, so far as engaged in telegraphic duties upon said railroads, and of the employees of the Telegraph Company engaged in the maintenance, repair, renewal and
16 reconstruction of said telegraph lines along said railroads and the transportation of men, material and supplies therefor, should be vested in a competent joint superintendent of telegraph, who should be appointed and whose salary should be fixed by the Railroad Company, with the approval of the Telegraph Company, which salary should be paid equally by the Railroad Company and the Telegraph Company; that said joint superintendent should be removable for cause by either party and should be subordinate to and under the control of the Telegraph Company so far as necessary to enforce its rules, regulations and orders regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of its lines, and the transaction of the commercial telegraph business upon said railroads; that said joint superintendent should decide upon the number of linemen to be employed for ordinary repairs and the places at which they should be stationed, after consultation with both parties, and that he should also be subordinate to and under the control of the Railroad Company so far as necessary to enforce its rules, regulations and orders regarding the maintenance, management, arrangement and operation of its exclusive railroad wires, and that he should co-operate with both parties in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon, and that the Railroad Company should furnish office room and light and fuel therefor for said joint superintendent and that each party should supply the clerical force for its own business.

In the twentieth paragraph thereof, that in case of any disagreement between the parties concerning the meaning of any provisions of the contract or operations thereunder, there should be arbitration.

In the twenty-first paragraph thereof, that said contract should terminate all previous agreements between the parties, should continue in force for fifty years from October 15, 1887, and
17 might be renewed after the expiration of such term for further terms of fifty years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the preceding period, and that a violation of any of the provisions of the agreement by either party, while entitling the other to a claim for damages and the usual remedies for specific en-

forcement, should not be held to void the agreement or to abrogate the obligations or the undertakings of either party thereto.

VI. That none of the service to be rendered by either party to said contract to the other, in accordance with the terms thereof, is free in the sense of gratuitous, but that all such service is fully compensated for by the various interwoven considerations in said contract, which considerations are the bases of the mutual undertakings thereunder, and that each party to said contract receives from the other just and reasonable and full remuneration for the services to be rendered by it under said contract, such remuneration being paid, in accordance with the terms of said contract, in services rendered by the other party thereto and in other manners as in said contract provided. That it is essential to the efficient, proper and safe operation of trains by your orator over its several lines of railroad, not only to meet usual but also emergency and extraordinary demands, and is essential to the proper discharge by your orator of its duty to the public, that your orator should have at all times available to it, instant, first-hand and unlimited telegraphic service, not only along the immediate right of way of your orator's said railroads, but also between various offices of your orator's railroad system along such lines and offices necessarily maintained by your orator for said proper discharge of its duty in the City of New York and at other places throughout the United States not on said lines of railroad, and more particularly between the City of Philadelphia and the City of New York, between which the trains of your orator are operated,
18 under certain agreements, over the lines of other railroad companies, including subsidiary companies which are controlled by your orator through stock ownership, and that if such telegraphic service were not furnished to your orator by the defendant or some other equally equipped telegraph company affording similar and as comprehensive service, your orator would be compelled, as an operating necessity, to construct and maintain for itself, not only telegraph lines along the lines of your orator's said railroads, but also telegraph lines between the City of New York and the City of Philadelphia and between points on your orator's said railroad system and other important centers throughout the United States.

VII. That in the year 1906 the Congress enacted the so-called Hepburn Act, approved June 29, 1906, by which Section 6 of the Interstate Commerce Act was amended so that it provided, among other things, as follows:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

That on September 15, 1906, the Interstate Commerce Commission formally announced in a general tariff circular, the following Administrative Ruling:

"Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

That on October 12, 1906, said Commission announced a further Administrative Ruling with respect to free passes and free transportation in which, among other things, it stated that the Commission did not construe the latter as preventing a carrier from giving free or reduced rate carriage over its own lines to contractors, for materials, supplies and men for use in the construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced carriage are made a part of the specifications upon which the contract is based and of the contract itself.

That on December 21, 1906, said Commission announced its report "In the Matter of Railroad-Telegraph Contracts" (12 I. C. C. Reps., Vol. XII, p. 10), in which it affirmed and construed said Administrative Rulings of September 15th and October 12th, 1906, and stated that in making said ruling of October 12th the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain purposes only, applied, inter alia, to materials, supplies and men required under contracts between railroad and telegraph companies for the construction, maintenance and operation of telegraph lines upon and along the rights of way of such railroad companies, and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own rights of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their own rights of way in the performance by such companies of a telegraph service for the public. That the Commission further stated that it had heard the arguments of counsel for telegraph companies for a modification of the above rulings, so far as they might control and govern certain contracts between the telegraph companies and certain railroad companies under which, in consideration of the free telegraph service accorded by the telegraph companies over wires on the lines of the respective contracting railroad companies, the latter agreed to furnish free or reduced-rate transportation to such telegraph companies for the men,

materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers, and the Commission further held as follows:

"The Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of the law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers."

21 That the Commission further held that "such contracts with telegraph companies may lawfully be entered into," by railroad companies, and that in consideration of the construction, maintenance and operation of the telegraph line upon the right of way, which telegraph line the railroad company would otherwise be compelled, as an operating necessity, to construct and maintain, the carrier may accord to the telegraph company free or reduced-rate transportation for the men, materials and supplies of the telegraph company required and necessary in connection with the construction, maintenance and operation of the telegraph lines upon such carriers' own right of way; but that so much of any such contract between a telegraph company and a railroad company as stipulates or contemplates that such railroad company will furnish free or reduced-rate transportation for the employes, materials or supplies of the telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off lines of such carrier (or system) was unlawful under the terms of the Act to Regulate Commerce; that no railroad or system could lawfully stipulate or contract with a telegraph company for the carriage of its employes or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation and maintenance of a telegraph service on its own lines or system.

That on June 3, 1907, said Commission announced its Administrative Ruling No. 219, with respect to "transportation of men or property for telegraph companies," in which it referred to and amplified such provisions, rulings and decisions.

That on November 15, 1907, said Commission announced an Administrative Ruling applying said Ruling No. 219 to telephone service and calling upon carriers that had not already done so

22 promptly to file with said Commission copies of all contracts for telegraph or telephone service on their lines.

That as your orator is informed and believes, all of the contracts then existing between the various railroad companies and the various

telegraph companies for the exchange of service were thereupon filed with said Commission and remain there filed.

VIII. That your orator, acting in the belief that the aforesaid Hepburn Act and the aforesaid Administrative Ruling of September 15, 1906, announced by the Interstate Commerce Commission, required it so to do, on October 1, 1906, informed defendant that because of said statute as amended it would not further perform said contract to the extent of furnishing interstate transportation for employees and material in connection with the construction, operation and maintenance of telegraph lines off the lines of its railroad, and that it would thenceforth demand of defendant the usual and full rates of carriage on all materials and supplies for repairs, improvements, renewals or extensions of said telegraph lines, consigned to points off the line of your orator's railroad, and demand the usual full passenger and freight rates for carriage over said lines of railroad for such of the employees of defendant as were traveling and material as was shipped to points off the line of your orator's said railroad.

That thereafter, to wit, in the year 1908, defendant filed a bill of complaint against your orator in the United States Circuit Court for the District of Maryland, wherein it prayed that Court to decree that said contract was still in full force and effect, and that your orator might be required specifically to perform the same.

That to said bill of complaint your orator interposed its answer, wherein it alleged by way of defense that its refusal to perform certain obligations created by said contract and its statement that such portions of said contract were annulled by said Hepburn Act, were in strict conformity with the rulings of said Interstate Commerce Commission and with the provisions of said Hepburn Act, as interpreted by said Commission, and that its said refusal was due to and because of the rulings of said Commission and advice of counsel that said rulings were lawful and in conformity with said Hepburn Act, and that it was your orator's legal duty strictly to comply therewith.

That by express leave of said Court said Interstate Commerce Commission, through its solicitor, submitted and filed a written argument on behalf of said Commission as amicus curiae, and that thereupon argument for both parties was heard by said Court.

That before said Court had made any decision in said case the Congress enacted an act approved June 18, 1910, entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," which Act extended the provisions of the Interstate Commerce Act to telegraph, telephone and cable companies, and amended Section 1 of said Interstate Commerce Act so that it contained, among other provisions, the following:

"That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

That your orator begs leave hereinafter again to refer to said stat-

ute and the circumstances and the history of the relations between railroad and telegraph companies preceding and at the time of the enactment thereof.

That immediately after the approval of said statute, the parties to said suit, acting in the belief that the meaning and intent of said statute was to permit the continued performance by them of the obligations which they had contracted to perform under said
24 contract, "Exhibit A," consented to the withdrawal of said suit, and said United States Circuit Court for the District of Maryland thereupon entered its decree in said suit by the Western Union Telegraph Company against The Baltimore & Ohio Railroad Company, in language as follows:

"This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by Congress an 'Act to create a Commerce Court, and to amend the Act entitled "An Act to Regulate Commerce," approved February 4, 1887, as heretofore amended, and for other purposes,' and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22nd day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs."

That thereafter your orator and defendant proceeded again fully to perform their respective obligations under their said contract and adjusted their relations for the period intervening between October 1, 1906, and the entry of said decree, in accordance with the terms of said contract, and that with the exception of said period your orator has at all times fully and faithfully observed, kept and performed all the obligations and requirements under said contract on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money in furnishing facilities to the defendant, and has permitted defendant to make use of and enjoy for its poles and lines, the right of way of your orator, which is of a value of many hundred thousands of dollars, and the defendant has at all times availed itself of
25 the facilities thus afforded by your orator without complaint on its part that your orator was in any respect delinquent in failing to render to the defendant all the service and benefits that it was entitled to receive and enjoy under each and every of the provisions of said contract, and your orator now stands ready and is able and willing, and hereby tenders performance and continued performance to the defendant of each and every provision thereof, and of all the conditions and obligations imposed upon your orator thereby, and alleges that upon such performance on its part it is entitled to require from the defendant the performance of all the provisions of said contract thereby required to be performed on the part of the defendant.

IX. That said contract was continuously and in good faith observed and performed by the defendant until on or about April 25, 1916, when your orator was notified by defendant, in effect, that because of the approval and adoption on March 28, 1916, by said Interstate Commerce Commission of a conference ruling reading as follows:

"Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act. Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph Company regularly
26 charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

it would continue to carry out its contract in respect of the transmission of messages under franks, but would charge for such messages at its regular rates up to the contract allowances, billing your orator at full rates for excesses over those allowances; that since said date defendant has billed and continues to bill to your orator at the usual and full rates for the transmission of interstate messages off the lines of your orator, even though such messages were in the interest of your orator's business in the maintenance and operation of its railroads and included in and covered by said contract, and the defendant then asserted and has ever since asserted, and now asserts, that the performance of the obligations assumed by and imposed upon it in and by said contract in this respect is within the prohibition of said conference ruling of said Interstate Commerce Commission, except upon payment in money at the usual and full rates charged by defendant for its commercial business.

X. That defendant, Western Union Telegraph Company, shortly after its incorporation in the year 1851, began the work of construction and operation of telegraph lines in the State of New York and other states, and has continuously since that time been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired the use of a continuous system of telegraph lines which now ex-

27 tends through all the states and territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico, and, through the said land lines of Mexico, with the telegraph lines of the Central and South American republics, and, by means of submarine cables, with the telegraph systems of foreign countries; that at the present time its system of telegraph lines operated and controlled by it, as aforesaid, comprises over 200,000 miles of poles and cables, and over 1,000,000 miles of wire; that upon said system of telegraph lines defendant has nearly 25,000 offices, about 20,000 of said offices being railroad offices yielding revenues too small to pay for maintenance, separate and apart from the advantages derived from contracts with railroad companies as hereinafter referred to, and which, but for such contracts, could not be maintained as independent telegraph offices, and would not, therefore, afford telegraphic facilities to the public; that defendant transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for defendant, and exclusive also of messages forwarded by private parties leasing wires from defendant; that said system of lines has been built up so as to connect with and be largely operated from, the central offices of the defendant, which are situated in the City of New York, and said lines radiate therefrom to all important cities and commercial centers, and to many thousands of towns and villages in the United States and in North America, and through the ocean cables and land lines above described to all important commercial centers of this continent and the continent of Europe, and, through lines there situated, with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important

28 part of said system of defendant and connected with its main office, as aforesaid, in the City of New York, thereby connecting with all parts of the world as aforesaid, are lines of telegraph over and along the railroad and branches thereof of your orator.

XI. That one of the first uses of the telegraph after its invention was in connection with the operation of railroads, and that practically throughout the entire history of the operation of railroads in the United States down to the present time railroads have required and now require telegraph lines and the use thereof for their successful and safe operation; that for many years it has been and is now the custom of railroads operating in the United States to send their freight cars to final destination, without unloading, over the tracks of other companies, so that, as modern railroad operations are conducted, cars belonging to one railroad company are scattered along the tracks of nearly every other railroad company in the United States from the Atlantic Ocean to the Pacific Ocean and from Canada to the Gulf of Mexico, and that it is not merely desirable, but absolutely necessary, that the whereabouts of the particular cars of freight should be known to a railroad company at all times, and that the only means of obtaining such knowledge is through the instrumen-

tality of the telegraph, and that telegraph lines are required by railroads not only along their own rights of way, but to reach points upon other lines of railroad; that because of such and other reasons and necessities, there has grown up a relationship between railroad companies and telegraph companies for the exchange of services which has been embodied in contracts similar to said Exhibit A, which, as far back as the middle of the last century, were common between railroads and telegraph companies when they were in their infancy; that such contracts present strong economical and business reasons in the interest of the public for their existence; that the telegraph companies require a speedy means of reaching all parts of their lines for repairing breaks caused by storms, and this facility is
29 afforded by the railroad companies; that the telegraph companies also require speedy methods of transporting their material and distributing it where needed; that such advantages are furnished by a railroad line but not by a highway line, and the lines of telegraph constructed along the rights of way of railroads furnish on the other hand to the railroads an ample surplus of facilities for the operation of the railroad, as aforesaid; that the economy and efficiency resulting from the construction of a pole line along the right of way of a railroad company as compared with the construction of a pole line along an independent right of way paralleling the railroad, have enabled the telegraph companies not only to offer commercial service in districts and at thousands of points where otherwise it would have been impossible except at prohibitive rates, but also have enabled the commercial service offered by the telegraph companies in general to be offered at materially lower rates to the public; that there are at the present time few, if any, railroads of any importance in the United States that are not operated under such contracts for the exchange of services with a telegraph company, thereby, through the furnishing of rapid and unlimited information as to the whereabouts and progress of railroad trains and the conditions affecting and instructions directing their movements, facilitating the safe, efficient and rapid operation of trains and contributing to the convenience and welfare of the public, and also, by the furnishing of rights of way and offices by the railroad companies in thousands of localities throughout the country, where commercial business of the telegraph companies would not be sufficient to support them, enabling the public to enjoy the advantages of the telegraph and avail itself of the necessity thereof for commercial, educational and social purposes.

That under the system of interstate traffic now existing in the United States, it is essential to the efficient and proper operation
30 of the interstate railroads of the country and the proper discharge by them of their duty to the public, that they should have at all times available to them, instant, first-hand and unlimited telegraph service, not only along their immediate respective rights of way, but also between various offices of said railroads along their said respective rights of way and offices necessarily maintained by them at other important centers throughout the United States not on their said respective rights of way, and that if such telegraphic

service were not furnished to such railroads by sufficiently and properly equipped telegraph companies, such railroads would be compelled, as operating necessities, to construct and maintain for themselves, not only telegraph lines along their respective rights of way, but also telegraph lines between their principal termini, junction points and other important stations and commercial centers throughout the United States not directly served by such railroads.

That none of the service contracted to be rendered by either a railroad company or a telegraph company to the other under such contracts, in accordance with the terms thereof, is free in the sense of gratuitous, but that all such service is fully compensated for by the various interwoven considerations in said contracts, which considerations are the bases of the mutual undertakings thereunder and that each party to said contracts receives from the other just and reasonable and full remuneration for the services rendered by it under said contracts, such remuneration being paid, in accordance with the terms of said contracts, in services rendered to it by the other party thereto and in other manners as in said contracts provided, and that in the making of such contracts the various considerations passing from the one party thereto to the other have been estimated and valued and by the parties determined to be equal.

XII. That such exchange contracts between the railroads and telegraph companies provide in general that the railroad shall
31 furnish the exclusive right of way for the telegraph lines, the transportation of men and material for the construction or maintenance or both of the telegraph lines, unskilled labor for construction, transportation for officers and employes of the telegraph company, traveling on its own business, without specific charge of tariff rates, services of telegraph operators where the commercial business of the telegraph company is not sufficient to justify that company in employing an operator exclusively engaged in its work, and office room, heat and light at the railroad's telegraph stations; that the telegraph company shall transmit for the railroad's designated officers or agents, telegrams relating to the railroad's business, without specific charge of tariff rates, furnish instruments and batteries for the railroad's use, maintain the lines, give the railroad's telegraphic orders for the movement of trains precedence over all commercial business on the wires, and give the railroad the right to free use of patents or new discoveries or inventions that the telegraph company owns or shall own or use in its telegraph business; that in some of such contracts the railroad is afforded, without specific charge, only a certain amount of telegraph service and for additional service pays in addition to the other considerations provided in the contract a specific item of consideration calculated either at tariff rates or on some other contract basis; that in others of such contracts the railroad, in addition to the other considerations moving from it, agrees to pay or credit the telegraph company for all telegraph service performed by it under the contract, a specific additional item of consideration calculated on the basis of rates other than the telegraph company's regular tariff of rates; that in some of such contracts the railroad pays full or half rates for telegrams

ordering sleeping car, parlor car or steamer reservations or other accommodations for passengers or customers which properly might be considered the railroad company's business; that the mutual
32 considerations and concessions in such contracts given each to the other by the respective parties thereto, include many services for which there were and are no tariff rates provided or required by law in any event, and that in negotiating such contracts railroad and telegraph companies have met, each endeavoring to secure the maximum facilities for itself and the general public for the least expenditure of money and material, and that it frequently has required months and years of negotiation to reach a final agreement, and that such mutual advantages as the consummated contracts give to the railroad and telegraph companies find expression in lower railroad and telegraph rates to the general public and better and more efficient service by both the railroad and the telegraph company. That prior to the enactment in 1910 of the amendment to the Interstate Commerce Act, as aforesaid, the fact had been recognized by Congressional acts that instant, first-hand and unlimited telegraphic service is essential to the efficient, proper and safe operation of railroad trains; the existence and general nature of contracts between the railroads and the telegraph companies providing for such telegraphic service and for the exchange of services between such companies had become known to and had been commented on by the Federal Courts, including the United States Supreme Court, in important and numerous cases; the operation by the railroads and the telegraph companies under such contracts had been openly followed and it had become to be a matter of common knowledge that practically throughout the entire history of the operation of railroads in the United States such contracts had been in existence.

XIII. That such contracts are the result of many years of experience and long negotiations between the railroads and the telegraph companies, which experience your orator protests is the
33 best foundation for the conclusions reached; that in arriving at the rates to be paid by the parties thereto for the services enjoyed by them respectively under such contracts consideration has always been had to all of the elements entering into such contracts, including the rights of way, the furnishing of poles and wires, batteries and materials, the furnishing of office space, light, fuel, and operators, the amount of freight and labor transportation necessary for the equipment and maintenance of the lines of telegraph wires, the supervision and operation of such lines and the furnishing of stationery and other facilities in connection therewith, and that no part of said contracts, as, for instance, the rates to be charged by and paid to the railroads for transportation of freight and employees under such contracts, or the rates to be charged by and paid to the telegraph companies for transmission of messages thereunder, can be changed without dislocating such contracts in their entirety and destroying every element of mutuality thereunder, thereby destroying and annulling said contracts and depriving the public, as well as the parties thereto, of all the benefits derived therefrom not only in connection with the use and operation

of the railroads, but also in the use of the widespread facilities offered by the telegraph companies.

XIV. That in its Twenty-First Annual Report to the Congress, dated December 23, 1907, said Interstate Commerce Commission (21st Annual Report, p. 25) referred to its aforesaid rulings and reports, and stated in the language hereinbefore quoted that the contracts between the telegraph companies and the carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts of carriers that have come to the attention of the Commission, and that so far as the Commission could then see the full performance of such contracts by the carriers with whom they were made would not affect any
34 public or private interest adversely, but that, nevertheless, the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. That said Commission also, in its Twenty-Second Annual Report to the Congress, dated December 24, 1908, (22nd Annual Report, p. 129), again referred to said rulings and reports.

XV. That in the light of the history of the relation between the railroads and the telegraph companies in the United States, as hereinbefore set out, and of the interchange of services between such companies based upon the interweaving of valuable and indispensable considerations, as shown by contracts existing throughout the period of railroad and telegraphic operations in the United States, and in the light of the fact that instant, first-hand and unlimited telegraphic service is essential to the efficient, proper and safe operation of railroad trains, as has been often recognized by congressional acts, and the fact that the interests of the public are promoted and not affected adversely by the existence of such contracts between railroad and telegraph companies and the operations thereunder, and that for the reasons aforesaid the destruction of such contracts would seriously injure the public service of the telegraph companies, not only as to the efficiency of such service but also as to the rates at which it could be furnished, and that any statute or ruling which altered any part of the rates as worked out in such contracts and under which services thereunder were exchanged between the railroads and the telegraph companies, would result in destruction of such contracts in their entirety, and having before it the construction placed upon said
35 so-called Hepburn Act by the Interstate Commerce Commission, as aforesaid, to the effect that such Act made it unlawful for such contracts to be carried out in their entirety, and having before it the reports of said Interstate Commerce Commission wherein said Commission stated its opinion to be that such contracts were sui generis and that so far as said Commission could see the full performance thereof would not affect any public or private interest adversely, but that said Commission knew of no provision of the law then in force which vested it with any authority or any clause of the law that afforded it a reasonable ground to differentiate

"off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers, the Congress amended, by Act approved June 18, 1910, Section 1 of said Interstate Commerce Act by providing, among other things, that it should apply to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district of the United States or to any foreign country, and by further providing that the provisions of said Section 1 of said Interstate Commerce Act, requiring that all charges made for any service rendered or to be rendered in the transportation of passengers or property should be just and reasonable and that every unjust and unreasonable charge for such service or any part thereof was prohibited and declared to be unlawful, should apply to the transmission of messages by telegraph, telephone or cable, provided that messages by telegraph, telephone or cable might be classified and different rates charged for the different classes, and by further providing that nothing in said Act should be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.

XVI. That said Interstate Commerce Commission in making its said conference ruling of March 28, 1916, as hereinbefore set
36 out, has misconstrued the purpose and intent of said act approved June 18, 1910, and that said act and the act to which it is an amendment do not justify such ruling or justify the defendant in violating its said contract with your orator; that the purpose of said act and of the act of which it is amendatory is to prohibit and prevent discrimination by common carriers in favor of one shipper or passenger as against other shippers and passengers in like cases, and that all inhibitions and prohibitions thereof are directed to securing equality of service by common carriers, including telegraph companies, for the customers of such common carriers, whether shippers of goods or passengers or transmitters of messages; that the relation of shipper and carrier was not created by said contract "Exhibit A," nor by the terms thereof was or is your orator or the defendant obliged to omit or forego any duty imposed upon your orator or defendant by law, but that by said contract a joint relation in the construction, maintenance and operation of telegraph lines and property was created, such telegraph lines being an indispensable instrumentality for the performance by each of the parties to said contract of the obligations assumed by it in the transactions of its business, and that all such similar contracts, as hereinbefore alleged, create a similar joint relation between the parties thereto for a similar purpose and with a similar result, and that the true intent, meaning and purpose of so much of said act approved June 18, 1910, as permits the making of contracts by telephone, telegraph and cable companies with railroads for the exchange of services, were expressly to permit the continuance of such long established, necessary and existing contracts and the performance by the railroads and the telegraph companies of all their mutual obligations thereunder.

XVII. That in accordance with the provisions of said contract, "Exhibit A," defendant is now lawfully in possession, to the
37 extent therein provided for, of so much of the right of way of your orator as is necessary to accommodate the telegraph lines of defendant, and of hundreds of offices along the entire system of your orator's said railroads; that the rates provided for in said contract to be paid by each of the parties thereto to the other for the services therein required to be rendered by them respectively are essential, exactly balanced and integral parts of said contract, and that any disturbance of the provisions of said contract in that respect would result in a destruction and nullification of said contract in its entirety; that the destruction or nullification of said contract would produce chaos in the business and operations of your orator's said railroad system and would disrupt and disorganize the same, and would prevent the efficient, safe and proper operation of its trains and the proper discharge of its duty to the public, and that for such reasons not only would it be impossible to compensate your orator in damages for the loss that it might sustain by reason of any attempted nullification of said contract, but also it would be impossible to measure or estimate in money what such damages would be; that the refusal of defendant specifically to perform said contract will impose upon your orator the necessity and burden of a great multiplicity of suits for the protection of its rights, in that such refusal will oblige your orator to pay in money for services from time to time rendered by defendant for which by said contract your orator has already rendered full consideration and satisfaction or agreed so to do, and compel your orator to sue defendant for the sum of each such payment or aggregate of payments from time to time during the whole term of said contract; that the defendant's breach of said contract is a continuous breach, and exists from day to day, and that in order for your orator to secure adequate relief it is not only necessary that defendant be enjoined from any further breach of said contract, but that it be required to
38 continue to observe the same in its entirety, and that your orator is, for the reasons aforesaid, without any adequate remedy at law in the premises.

Wherefore, as your orator can have no adequate relief at law, it seeks the aid of this Honorable Court in Equity, where only adequate relief can be administered in matters of this nature, and prays as follows:

1. That this Court will determine, adjudge and decree that said contract, "Exhibit A," is lawful and binding on the parties thereto and is still in full force and effect notwithstanding the conference ruling of March 18, 1916, of said Interstate Commerce Commission and notwithstanding the action of the defendant in respect of such contract or in asserted compliance with such ruling.

2. That this Court will order, adjudge and decree that the defendant, Western Union Telegraph Company, specifically perform said contract, "Exhibit A," your orator being ready, willing and hereby offering specifically to perform said contract in all things on its part and behalf.

3. That this Court will order, adjudge and decree that your orator is entitled to a perpetual injunction herein against the defendant, Western Union Telegraph Company, restraining it from in any manner violating the provisions of said contract, "Exhibit A," which this Court shall require said defendant specifically to perform on its part, and meanwhile and until the final decree of this Court that a temporary injunction be issued against the defendant prohibiting and restraining it from in any manner violating the provisions of said contract, "Exhibit A."

4. That your orator may have such other and further relief in the premises as the nature and circumstances of the case may
39 require and Your Honors may deem just.

5. That the defendant, Western Union Telegraph Company, may be required to answer the several matters and things hereinbefore set forth, but not under oath, answer under oath being hereby expressly waived.

May it please Your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to Western Union Telegraph Company, commanding it, at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court, then and there to answer the allegations of this bill, but not under oath, answer under oath being hereby expressly waived, and to abide by and perform such decree as may be rendered herein; and your orator will ever pray, etc.

THE BALTIMORE & OHIO RAILROAD COMPANY,

By GEO. M. SHRIVER, *Vice-President.*

Attest:

[SEAL.] C. W. WOOLFORD, *Secretary.*

WHITE & CASE,
Solicitors for Complainant.

J. DU PRATT WHITE,
GEORGE F. BROWNELL,
Of Counsel.

40 STATE OF MARYLAND,
City of Baltimore, District of ——, *ss.*

Geo. M. Shriver, being duly sworn, deposes and says that he is an officer, to-wit, the Vice-President of The Baltimore & Ohio Railroad Company, the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained in respect of the acts of said complainant are true of his own knowledge, and that as to the other matters therein stated he is credibly informed and verily believes them to be true.

GEO. M. SHRIVER.

Sworn to before me, this 8th day of December, 1916.

GEO. W. HAULENBREK,

[SEAL.] *Notary Public.*

My commission expires May 1st, 1918.

41 EXHIBIT A.

This agreement made this 15th day of October, 1887, by and between the Western Union Telegraph Company, hereinafter called the "Telegraph Company," party of the first part, and the Baltimore and Ohio Railroad Company, hereinafter called the "Railroad Company," party of the second part,

Witnesseth:

Whereas an agreement of date of October 5th, 1887, was made between the Telegraph Company and the Railroad Company, under which the Telegraph Company acquired from the Railroad Company certain Telegraph property, rights and interests, and by the terms of which it was agreed that an operating contract should be made between the Railroad Company and the Telegraph Company, covering the telegraph lines on the railroads owned, operated or controlled by the Railroad Company.

Now therefore in order to carry out the said provisions for the execution of an operating contract, it is mutually agreed between the parties hereto as follows:

First. The railroads now owned, operated or controlled by the Baltimore & Ohio Railroad Company, and referred to herein, are shown on Schedule A, hereto attached.

Second. The Telegraph lines specifically covered by this contract are shown on Schedule B and the wires thereon are of two kinds, designated on said Schedule as:

(*a*) Exclusive railroad wires.

(*b*) Commercial wires.

The term "exclusive railroad wires" shall be deemed to include the necessary instruments, switches, local batteries, loops and connections as now located, arranged and used on said wires, and as are necesary to continue in operation, the existing effective telegraph circuits between the several stations and offices of the

42 Railroad Company in the various Cities, Towns and places on the route of the said railroads, and also one wire between Philadelphia and New York City, together with the existing local wires in New York City now connecting the various offices and piers of the Railroad Company as now located and arranged, and as shown in said Schedule B.

Third. The Railroad Company retains the ownership of the "exclusive wires," as above defined.

Fourth. The Telegraph Company agrees to maintain, repair and reconstruct at its cost, in first class condition, all the said telegraph lines and such additional wires as either the Telegraph Company or the Railroad Company may place thereon, the Railroad Company, however, furnishing the necessary unskilled labor for such

maintenance, repairs and reconstruction of said lines and of said additional wires along said railroads; and also furnishing the necessary wire and material (not however including brackets and cross arms) for the maintenance, repair and reconstruction of the "exclusive railroad wires." The term "unskilled labor" shall not include either foremen, linemen, climbers, framers, nor any other laborers who require special skill in connection with telegraph construction and maintenance in order to properly perform the service, but shall include all the labor necessary to dig holes and set, reset and handle poles and other material; nor shall the Railroad Company furnish any tools required in connection with such work.

It is agreed that the location of any of the poles, wires or cables upon the right of way or property of the Railroad Company, shall from time to time, be changed thereon in such manner as the proper officers of the Railroad Company may direct, so as not to interfere with the operations of the Railroad, the Telegraph Company furnishing the skilled labor, and the Railroad Company the unskilled labor for such work.

43 Fifth. It is agreed that the Railroad Company shall have the right from time to time to acquire from the Telegraph Company or to erect necessary additional "exclusive railroad wires" upon and along the telegraph lines of the Telegraph Company named in Schedule B, the Railroad Company paying the cost of the wire, insulators, and other material (not, however, including brackets and cross arms) and the cost of the erection and equipment thereof; it being understood that where such wire acquired or erected is laid in cable in whole or in part, the Railroad Company shall only be charged with the pro rata cost of such conductor or conductors in said cable, as may be set apart for the exclusive use of the Railroad Company, and the pro rata rental of ducts in which the same may be placed. It is agreed however that if the Telegraph Company shall remove its poles and fixtures from any route of said Telegraph lines shown in Schedule B, in any City, Town or place, and re-locate the same in underground conduits or other structures, then the Telegraph Company shall remove the exclusive railroad wires from such poles and fixtures and place the same in such conduits or other structures or substitute new wires therefor in such conduits or other structures, the Railroad Company paying the cost of removing such wires and placing the same in said conduits or other structures, or the cost of such new wires and the pro rata rental of said conduits or other structure or the pro rata cost of construction thereof.

The Railroad Company shall not be required however to furnish any unskilled labor for maintenance, renewal, or reconstruction of any part of said telegraph lines not upon or along or adjacent to its right of way. And the Telegraph Company shall, upon the request of the Railroad Company connect by overhead wires the present "exclusive railroad wires," and such as may be hereafter acquired or erected as herein provided, with additional offices, stations and

44 buildings of the Railroad Company, in the several Cities and Towns on the route of said railroads, and also in the Cities of New York and Brooklyn, if and so long as the Telegraph Company

shall have poles or house top fixtures available for reaching such additional offices, stations and buildings, and the Railroad Company agrees to pay the cost of the wire, insulators and other material and the cost of the erection and equipment thereof; and also to pay any bridge and house top or fixture rentals which the Telegraph Company may have to pay for such wires. It being understood that in cases where it may be necessary to use aerial cables in the acquisition or erection of such additional wires and connections the Railroad Company shall only be charged with pro rata cost of such conductor in said aerial cable or cables as may be set apart for the exclusive use of the Railroad Company.

If the Telegraph Company shall have an underground conduit available for reaching the Railroad Company's offices, stations and buildings in any such town, City or place, the Telegraph Company will furnish the Railroad Company such connecting wires as the Telegraph Company may be able to supply in the said conduit or conduits used by it, the Railroad Company hereby agreeing to pay to the Telegraph Company the entire cost of the wire and of placing the same in the conduit, and the pro rata cost of construction or rental and maintenance of such conduit or conduits.

Sixth. The Telegraph Company shall furnish, free of cost, the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and hereby grants to the Railroad Company for use, upon the railroad wires, the free use of all telegraphic patents, which the Telegraph Company or its subordinate Companies, now, or hereafter own, or own and use for the general telegraph business; but this grant shall not require the Telegraph Company to make any payments on account of such free use to any minority interests in such subordinate Companies, but any such payments to minority interests shall be chargeable to the Railroad Company.

It is understood and agreed that the Railroad Company shall furnish all instruments, local batteries, stationery and other material for railroad business.

Seventh. The Railroad wires shall be used only by the Railroad Company for its railroad business, and shall not be used for the transmission of any commercial or public telegraph business, for tolls, except as hereinafter set forth. It is agreed, however, that where there is but one wire, as shown on said Schedule B., it may be used jointly by the Telegraph Company with the Railroad Company, important railroad messages, directing the movement of trains, having precedence, until such time as in the judgment of the President of the Railroad Company such joint use may be detrimental to the business of the Railroad Company, and in such case the Telegraph Company shall erect an additional wire for commercial business. In all other cases the railroad wires may from time to time be used by the Telegraph Company jointly with the Railroad Company with the Railroad Company's assent, when not in use for railroad business.

Whenever the railroad wires have become disabled the Railroad Company shall have the right to take and use jointly with the Tele-

graph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires has been effected and the circuits restored.

But the through commercial wires or circuits shall not be subject to such use by the Railroad Company, except in cases of extreme emergency.

Eighth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroads as it may deem necessary.

46 At all telegraph stations of the Railroad Company, it shall furnish operators at its own expense; and its operators and other employees acting as agents of the Telegraph Company, shall receive, transmit, and deliver exclusively for the Telegraph Company, such commercial or public messages as may be offered, and shall charge the tariff rates of the Telegraph Company thereon, and shall render to the Telegraph Company exclusively, monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the Telegraph Company in such manner and at such times as it may direct, but it is understood that in the transaction of all such telegraph business said operators and all other employees shall be held to be only the agents of the Telegraph Company, and shall conform to all rules, regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free.

And said operators and other employes shall not, without the consent of the Telegraph Company transmit over the Telegraph lines covered by this agreement, any free messages except those herein provided for.

Whenever the number of paid and collect messages sent from any railroad office amounts to 3,000 or more in any one year, (30 words of press matter sent being counted as one message) the Telegraph Company shall thereafter provide an operator for such office, so long as said messages amount to said number, and said operator acting as the agent of the Railroad Company shall attend to the telegraph business of the Railroad Company without charge, so long as one operator can attend to the telegraph business of both parties. No employee of the Railroad Company shall while in its service be employed in the transaction of commercial or public telegraph business by or for any party other than the Telegraph Company; and the Telegraph Company shall have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or

47 public telegraph business as against any other party.

Ninth. If the Telegraph Company elects to establish an office in a station building of the Railroad Company the Railroad Company shall, if it can conveniently furnish the space therefor, provide office room in such building and light and fuel thereof, free of charge, and if at such station one person can attend to the telegraph business of both Companies, the operator of the Telegraph Company at such office, acting as the agent of the Railroad Company, shall attend to

the telegraph business of the Railroad Company without charge, and shall conform to all the rules and regulations of the Railroad Company applicable thereto.

Whenever the telegraph business of both Companies at any office where the Telegraph Company furnishes the operator becomes so large as to require more than one operator, then the Railroad Company shall employ and pay its own operator.

Tenth. The Telegraph Company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all Cities, Towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the Telegraph Company or its subordinate Companies in any of the said Cities, Towns and places and when so received shall be transmitted by the Telegraph Company over said telegraph lines free of charge. And if the same for any reason of convenience to the Telegraph Company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The Telegraph Company agrees to issue to such officers of
48 the Railroad Company, as may be designated by the President or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the Telegraph Company, or its subordinate Companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodation for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

Eleventh. The Railroad Company agrees to transport, free of charge over its said railroads, on application of the Superintendent or other proper officer of the Telegraph Company, all employees of the Telegraph Company when traveling on its business or engaged in its work along said railroads; and to likewise transport and dis-

tribute free of charge, all poles and other material and supplies of the Telegraph Company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B, along said railroads, and of such additional wires as may be
49 erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the Railroad Company also agrees to transport, free of charge, the employes of the Telegraph Company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the Telegraph Company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding ten thousand ($10,000.00) per annum, calculated at the current transportation rates of the Railroad Company; and the Telegraph Company agrees to pay to the Railroad Company one half of its aforesaid rates on all such transportation of employes and poles and other material in excess of said amount. Settlements to be made yearly.

Twelfth. The Telegraph Company agrees to pay to the Railroad Company the sum of sixty thousand dollars per annum, in equal instalments of five thousand dollars at the close of each month, during the continuance of this agreement, accounting from October 15th, 1887.

Thirteenth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save the Railroad Company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free or at half rates over said railroads under this agreement, whether such loss or damage arise from the neglect of said Railroad Company or its em-
50 ployes or otherwise, and shall likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business; and the Telegraph Company shall not be responsible for and the Railroad Company agrees to indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure, delay or default in the transmission or delivery of any and all messages sent for the Railroad Company under this agreement.

Fourteenth. Neither the general terms of this agreement nor any stipulation contained herein shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the Railroad Company, and in favor of the Telegraph Company, as against the owner of the fee simple of the land over which the Railroad Company or of any of its subordinate Companies, has the right of way. Nor as against the exercise of the power of eminent domain

on the part of any other Companies possessing it by grant from any state, or of the United States.

And it is further agreed that if anything herein contracted to be done, or not to be done shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of any excess or defect of corporate or legal authority in so doing.

Fifteenth. Should the Railroad Company build new extensions or branches or acquire other railroads by purchase, lease, ownership of stock, or otherwise, then the provisions of this contract shall apply thereto and to the telegraph lines thereon, to the same extent as if such telegraph lines and railroads had been included in said Schedule- A. and B.; and if there be no telegraph line on such roads then the Telegraph Company shall furnish material and construct
51 one thereon, and maintain, repair and reconstruct the same, the Railroad Company hereby agreeing to furnish the unskilled labor for such construction, maintenance, repair and reconstruction, of such line, and of such additional wires as may be erected thereon; and the Telegraph Company will set apart thereon for the Railroad Company's railroad business one exclusive railroad wire. If there be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road then there shall be set apart for the use of the Railroad Company such "exclusive railroad wire or wires" thereon as may have been previously used for railroad business exclusively.

If the Railroad Company shall acquire a telegraph line on any such road, the Railroad Company agrees to sell and the Telegraph Company agrees to purchase, such telegraph line at a valuation to be agreed upon, based on the cost of constructing and equipping a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment.

If the parties hereto cannot agree upon such valuation, the same shall be fixed by arbitrators to be appointed in the manner hereinafter provided.

Upon all such extensions, branches, and leased, controlled or hereafter acquired roads, the Railroad Company shall be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of Article 10 hereof on said existing railroads, and the ten thousand dollar per year limit of free telegraphic service, as provided by the second clause of said Article 10, shall be increased six dollars per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled, or hereafter acquired roads; and the Telegraph Company shall be entitled to free transportation service for employees, poles and other material and supplies to the same extent for use thereon, and in the same manner as provided by
52 the first clause of Article 11 hereof; and the ten thousand dollar per annum limit for free transportation provided for by the second clause of Article 11 shall be increased six dollars per annum per mile of such road occupied as aforesaid.

Sixteenth. The Railroad Company so far as it lawfully may hereby grants and covenants and agrees to assure to the Telegraph Company the exclusive right of way on, along and under the lands, roads and bridges, of the Railroad Company, and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon the said existing lines of poles and any renewals thereof upon said railroads, and also the right to construct one additional line of poles and wires or an underground line upon, along or under said railroads, as the Telegraph Company may deem expedient, but the location of any such additional line of poles and wires, or underground structures, shall be made in such way as not to interfere with the operations of the Railroad Company, and at such places on the right of way or lands of the Railroad Company as shall be designated by the proper officer of the Railroad Company. And the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, as far as the Railroad Company legally may.

And the Railroad Company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other telegraph or telephone line in competition with the lines or business of the Telegraph Company, except at and for the Railroad Company's current local rates;
53 nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, so far as such refusal and limitation of transportation may be lawful; provided, always that in protecting and defending the exclusive grants herein conveyed the Telegraph Company may use or proceed in the name of the Railroad Company or of any subordinate Company whose road or property may be owned, leased or controlled by the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, cost, charges and legal expenses incurred therein or thereby.

But this contract shall not be held to require the Railroad Company to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than said existing telegraph lines and renewals thereof upon said railroads, and the additional wires that may be placed thereon and the lines hereinbefore provided for on extensions, branches and acquired roads.

Seventeenth. The term "Subordinate Companies" as used in this contract, shall be deemed to include all Companies controlled by ownership of stock, lease, contract for operation or in any other manner by either of the parties hereto.

And the term "telegraph line" or "telegraph lines" shall be deemed to include the line of poles, wires, cable and cables thereon,

batteries connected therewith, and other devices necessary for their efficient telegraphic operation.

Eighteenth. It is mutually understood and agreed that the telegraph lines, poles, wires and fixtures covered by this contract, shall form part of the general telegraphic system of the Telegraph Company and shall be controlled and regulated by the Telegraph Company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests.

And the Railroad Company expressly agrees that no wire
54 now or hereafter owned, leased, controlled or used by it, shall at any time be used or employed directly or indirectly in competition with the Telegraph Company, or by or for any party other than the Railroad Company and the Telegraph Company, and the Railroad Company will not at any time during the continuance of this agreement engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of this agreement.

Nineteenth. It is agreed that the management and control of the railroad employes so far as engaged in telegraphic duties upon said railroads and of employes of the Telegraph Company engaged in the maintenance, repair, renewal or reconstruction of said telegraph lines along said railroads, and the distribution of men, material and supplies therefor, shall be vested in a competent joint Superintendent of telegraph who shall be appointed and whose salary shall be fixed by the Railroad Company, with the approval of the Telegraph Company; and the salary of said joint Superintendent shall be paid equally by the Railroad and Telegraph Company and said joint Superintendent shall be removable for cause by either party and shall be subordinate to and under the control of the Telegraph Company, so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, repair, removal or reconstruction, operation, management and arrangement of said Company's lines, and the transaction of the commercial telegraph business upon said railroads; and said Joint Superintendent shall decide upon the number of linemen to be employed for ordinary repairs and the places at which they shall be stationed after consultation with both parties hereto; and he shall also be subordinate to and under the control of the Railroad Company so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, management, arrangement and operation of said
55 Company's exclusive railroad wires. It being understood and agreed that he shall co-operate with both parties hereto in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon.

The Railroad Company shall furnish office room and light and fuel therefor for said Joint Superintendent and each party shall supply clerical force for its own business.

Twentieth. In case of any disagreement between the parties hereto concerning the meaning of any of the provisions of this agreement or the operations hereunder, such difference shall be referred to three

arbitrators, one to be chosen by each party and the third to be selected by the two thus chosen. And the decision of a majority of such arbitrators shall be final and conclusive upon the parties. In case either party neglects for the period of thirty (30) days to appoint an arbitrator after delivery to it of written notice by the other party, the party not in such default may appoint such arbitrator, and the two thus selected may choose a third, and the decision of a majority of the three thus chosen shall be final and conclusive.

Twenty-first. The execution of this agreement shall terminate all previous agreements now existing or which may be claimed to exist between the parties hereto, or their predecessors or their sub Companies respectively, in the ownership or control of their properties respectively, and covering the construction, maintenance or operation of telegraph lines along the railroads or any of them covered by this agreement; and this agreement shall continue in force for the term of fifty (50) years from October 15th, 1887; and may be renewed after the expiration of said term for further terms of fifty (50) years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the first and each successive period of fifty years. A violation of any
56 of the provisions of this agreement by either party while entitling the other to a claim for damages and the usual remedies for specific enforcement shall not be held to void this agreement or to abrogate the obligations or the undertakings of either party hereto.

In witness whereof the parties to these presents have caused the names of their proper officers to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY.

(Signed) By JNO. VAN HORNE,
[SEAL.] *Vice President.*

(Signed) A. R. BREWER, *Secretary.*

THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Signed) By S. SPENCER,
[SEAL.] *President.*

(Signed) ANDREW ANDERSON, *Secretary.*

SCHEDULE "A."

List of Railroads Owned, Operated, or Controlled by the Baltimore and Ohio Railroad Company.

Philadelphia Division.

Comprising the following lines:

Philadelphia Branch, Baltimore to State line between Delaware and Maryland.

Baltimore and Philadelphia Railroad from State line between Maryland and Delaware to Philadelphia.

Landenburg Branch from Wilmington, Delaware to Landenburg, Penn.

Schuylkill River East Side Railroad in the City of Philadelphia with Branch line to Delaware River.

57 Main line and Branches east of the Ohio River as follows:

Main line Baltimore to Wheeling.

Washington Branch, Relay, Maryland to Washington, D. C.

Curtis Bay Branch, Baltimore to Curtis Bay.

Alexandria Branch, Alexandria Junction to Sheppards.

Metropolitan Branch, Washington, D. C. to Washington Junction, Maryland.

Frederick Branch, Frederick Junction to Frederick, Maryland.

Washington County Railroad, Weverton, Maryland, to Hagerstown, Maryland.

South Branch Railroad, Green Spring to Romney, West Virginia.

Parkersburg Branch Railroad, Grafton to Parkersburg, W. Va.

Fairmont, Morgantown and Pittsburgh Railroad, Fairmont to Morgantown.

Pittsburgh Division—Cumberland, Maryland, to Pittsburgh, Penn.

Salisbury Railroad, Salisbury Junction to West Salisbury, Penn.

Short Line Railroad, O. and B. Junction to Trotter's, Penn.

Hickman Run Branch, Hickman to Cora, Penn.

Somerset and Cambria Railroad, Rockwood to Johnstown, Penn.

Berlin Branch, Berlin to Garrett, Penn.

Fayette County Branch, Cromwell to Uniontown.

Mount Pleasant Branch, Broad Ford to Mount Pleasant, Penn.

Wheeling, Pittsburgh and Baltimore Railroad, Glenwood, Penn., to Wheeling, West Virginia.

Harpers Ferry and Valley Branch Division.

Winchester and Potomac Railroad, Harpers Ferry to Winchester.

58 Winchester and Strasburg Railroad, Winchester to Strasburg.

Harrisonburg and Strasburg Railroad (leased line of Va. Mid.) Strasburg to Harrisonburg.

Trans-Ohio Divisions.

Central Ohio Railroad, Columbus to Bellaire, Ohio.

Sandusky, Mansfield and Newark Railroad, Sandusky to Newark, O.

Newark, Somerset and Straitsville Railroad Newark to Shawnee, Ohio.

Baltimore and Ohio and Chicago Railroads, Chicago Junction to Chicago, Illinois.

59 *Answer.*

District Court of the United States, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Answer.

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Defendant The Western Union Telegraph Company now comes and for answer to the bill of complaint to The Baltimore & Ohio Railroad Company, says:

1. Defendant admits the allegations of paragraphs 1, 2, 3 and 4 of said bill of complaint.

2. Defendant admits the allegations of paragraph 5 of said bill of complaint and the making of the said contract Exhibit A, portions of which are set forth in said paragraph 5, but for the full force, meaning and effect of said contract defendant refers to said contract, a copy of which is attached to said bill of complaint marked Exhibit "A."

3. Defendant admits the allegations of paragraphs 6, 7 and 8 of said bill of complaint.

60 4. Defendant admits the allegations of paragraph 9 of said complaint, and defendant further says, with respect to said ruling of said Commission, that the telegraph system of defendant consists of many thousands of miles of pole lines and wires, and is in a very large part made up of lines of telegraph constructed under and in accordance with approximately thirteen hundred (1300) contracts with approximately three hundred different railroads and railroad systems throughout the United States, said contracts being in substance similar in the underlying provisions to the contract set forth in the bill of complaint herein; and that by reason thereof a very large part of defendant's business is dependent upon such contracts and is carried on in railroad offices, manned by telegraph operators employed by the railroad companies along the lines of said roads.

That defendant, upon the making of the ruling of the Interstate Commerce Commission originally under date of July 15th, 1914, and later reaffirmed under date of March 28th, 1916, in view of the many and severe penalties which would attach should that Commission's interpretation of the Interstate Commerce Act as applied to this defendant be sustained, felt compelled and now feels compelled to adopt and apply the same (although advised that it is doubtful whether such construction of said Act is correct), not only with respect to its operations and dealings under the contract between com-

plainant and defendant as set forth in said bill of complaint, but also with respect to its operations and dealings with all the other railroad companies and systems under the contracts above set forth, all of which contracts as stated in said bill of complaint have been filed by the railroad companies with the Interstate Commerce Commission.

5. Defendant admits the allegations of the 10th, 11th, 12th, 13th, 14th, 15th and 16th paragraphs of said bill of complaint.

61 6. Defendant admits the allegation of the 17th paragraph of said bill of complaint, and says that defendant is willing to carry out said contract between complainant and defendant as it was entered into, but has felt compelled to refuse to carry out the same in the particulars named in said bill of complaint by reason of the ruling of said Interstate Commerce Commission set forth in said bill of complaint, with respect to the limitation upon the right of plaintiff and defendant to enter into contracts for the exchange of services.

Wherefore, defendant asks that this Court determine the rights and obligations of complainant and defendant respectively under the provisions of said contract and under and in accordance with the provisions of the Interstate Commerce Act, and that defendant may have such other and further relief in the premises as the nature and circumstances of the case may require and your Honors may deem just, and defendant will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY.
By RUSH TAGGART, *Vice-President.*

Attest:
ANDREW F. BURLEIGH, *Secretary.*

62 *Decree.*

At a Term of the District Court of the United States within and for the Southern District of New York, in the Second Judicial Circuit, in the Borough of Manhattan, City and State of New York, on the 28th Day of February, 1917.

Present: Hon. Julius M. Mayer, District Judge.

In Equity.

No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
against
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Decree.

This cause came on to be heard at this Term and was argued by counsel; thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows, viz:

1. That a certain contract or agreement, made October 15, 1887, by and between the Western Union Telegraph Company, of the first part, and The Baltimore & Ohio Railroad Company, of the second part, copy of which contract or agreement is annexed
63 to and forms part of the Bill of Complaint herein, is lawful and binding upon the parties thereto, and is still in full force and effect notwithstanding the Conference Ruling of March 28, 1916 of the Interstate Commerce Commission, and notwithstanding the action of the defendant herein in respect of such contract or agreement or in asserted compliance which such Ruling.

2. That said Defendant, Western Union Telegraph Company, specifically perform the said contract or agreement of October 15, 1887, between it and said The Baltimore & Ohio Railroad Company, in all respects.

3. That said Defendant, Western Union Telegraph Company, be and it hereby is perpetually enjoined and restrained from in any manner violating the provisions of said contract or agreement dated October 15, 1887, between it and said The Baltimore & Ohio Railroad Company.

4. That the Complainant have costs of this action to be taxed.

Dated, New York, February 28, 1917.

JULIUS M. MAYER,
United States District Judge.

64 *Opinion.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant.

J. Du Pratt White, George F. Brownell and Vermont Hatch, all of New York City, for plaintiff.

Rush Taggart, of New York City, for defendant.

Joseph W. Folk and Otis W. Kent, of Washington, D. C., for Interstate Commerce Commission, amicus curiæ.

The cause having come up on bill and answer, plaintiff seeks a decree adjudging that (1) a certain contract between the parties is lawful and in full force and effect; (2) defendant specifically perform the contract, and (3) plaintiff have an injunction against defendant restraining it from violating the provisions of the contract.

On October 15, 1887, the parties entered into the written contract here under consideration. (The numbers hereinafter
65 refer to paragraphs of the contract.)

The Contract.

(1) Enumerated by reference to a schedule the railroads owned by plaintiff (hereinafter called Railroad).

(2) Enumerated by reference to a schedule the (*a*) exclusive railroad wires and (*b*) commercial wires of defendant (hereinafter called Telegraph Co.) and provided that "exclusive railroad wires," should be deemed to include the necessary instruments and connections, as then located and used on said wires and as necessary to continue in operation the existing effective telegraphic circuits between the several stations and offices of the Railroad in the various places on the routes of the railroads then owned, leased, operated or controlled by the Railroad, etc.

(3) The Railroad was to retain the ownership of said "exclusive railroad wires."

(4) The Telegraph Co. agreed to maintain, repair and construct, at its own cost, all the telegraph lines specifically covered by said contract and such additional wires as either the Telegraph Co. or the Railroad might place thereon, the Railroad, however, to furnish the necessary unskilled labor for such maintenance, repairs and reconstruction and the necessary wire and material, not including brackets and cross-arms, for the maintenance, repair and reconstruction of the "exclusive railroad wires"; the location of any poles, wires or cables upon the right of way or property of the Railroad should, from time to time, be changed thereon in such manner as the officers of the Railroad might direct, so as not to interfere with the operations of the railroad, the Telegraph Co. furnishing the skilled labor and the Railroad the unskilled labor for such work.

(5) The Railroad should have the right to acquire from the Telegraph Co., or to erect, additional "exclusive railroad
66 wires" upon the telegraph lines covered by the contract, the Railroad paying the cost of material, not including brackets and cross-arms, and of direction and equipment, etc.; the Railroad should not be required to furnish any labor in connection with lines not upon its right of way and the Telegraph Co. should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad in the cities and towns along its route, and also in the Cities of New York and Brooklyn, where the Telegraph Co. had facilities therefor, and if the Telegraph Co. should have underground conduits available for reaching the Railroad's offices, stations and buildings, the Telegraph Co. should furnish the Railroad such connecting wires as it might be able to supply in said conduits upon payment by the Railroad of the entire cost of the wire and of placing the same in the conduits and the pro rata cost of construction or rental and maintenance of the conduits.

(6) The Telegraph Co. should furnish free of cost the use of its main batteries for the efficient operation of all railroad wires and also all instruments, stationery and other material for commercial business, and should grant to the Railroad for use upon the railroad wires the free use of all telegraphic patents then or thereafter

owned or used by the Telegraph Co. or its subordinate companies, for the general telegraph business, except that any payments which the Telegraph Co. might be required to make on account of such free use to any minority interests in subordinate companies should be charged to the Railroad and the Railroad should furnish all instruments, stationery and other material for railroad business.

(7) The railroad wires should be used only by the Railroad for its railroad business and should not be used for the transmission of any commercial or public telegraph business for tolls except
67 that where there was but one wire it might be used jointly by the Telegraph Co. with the Railroad, important railroad messages directing the movement of trains having precedence, until such time as in the judgment of the President of the Railroad such joint use might be detrimental to the business of the Railroad, whereupon the Telegraph Co. should erect an additional wire for commercial business; that in all other cases the railroad wires might be used from time to time by the Telegraph Co. jointly with the Railroad, with the Railroad's assent, when not in use for railroad business; that whenever the railroad wires should become disabled the Railroad should have the right to take and use jointly with the Telegraph Co. any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad until the repair of the railroad wires had been effected and the circuits restored, but that the through commercial wires or circuits should not be subject to such use by the Railroad except in cases of extreme emergency.

(8) Either party might establish and maintain telegraph stations at such places on said railroads as it might deem necessary; at all telegraph stations of the Railroad it should furnish operators at its own expense; its operators and other employees acting as agents of the Telegraph Co. should receive, transmit and deliver exclusively for the Telegraph Co. such commercial or public messages as might be offered and should charge the tariff rates of the Telegraph Co. thereon, and should render to the Telegraph Co. exclusively monthly statements of such business and full accounts of all receipts therefrom, and pay all of such receipts to the Telegraph Co. but in the transaction of all such telegraph business said operators and all other employees should be held to be only the agents of the Telegraph Co. and should conform to all rules and regulations
68 of the Telegraph Co. applicable to all telegraph business, whether paid or free, and should not, without the consent of the Telegraph Co. transmit over the lines covered by said contract, any free messages except those therein provided for; whenever the number of paid and collect messages sent from any railroad office should amount to $3,000 or more in any one year, the Telegraph Co. should thereafter provide an operator for such office so long as said messages amounted to said number, and said operator, acting as the agent of the Railroad, should attend to the telegraph business of the Railroad without charge so long as one operator

could attend to the telegraph business of both parties; no employee of the Railroad should while in its service be employed in the transaction of commercial or public telegraph business for any party other than the Telegraph Co. and the Telegraph Co. should have the exclusive right to the occupancy of the Railroad's depots and station houses for commercial or telegraph business as against any other party.

(9) If the Telegraph Co. should elect to establish an office in a station building of the Railroad, the latter should, if convenient, provide office room therein and light and fuel therefor, free of charge, and if at such station one person could attend to the telegraph business of both companies, the operator of the Telegraph Co. at such office, acting as agent for the Railroad, should attend to the telegraph business of the Railroad without charge and conform to the rules of the Railroad applicable thereto; whenever the telegraph business of both companies at any office where the Telegraph Co. furnished the operator should become so large as to require more than one operator, the Railroad should employ and pay its own operator.

(10) The Telegraph Co. should receive and transmit from said lines along said railroads, and should deliver free of charge
69 the messages of the officers and agents of the Railroad pertaining to its railroad business, between all places then reached by said telegraph lines on said railroads; such messages should be received at and delivered from any of the offices of the Telegraph Co. or its subordinate companies in any of said places, and when so received should be transmitted by the Telegraph Co. over said telegraph lines free of charge; the Telegraph Co. should issue to officers of the Railroad annual franks authorizing the free transmission of messages relating strictly to railroad business of the Railroad originating at and destined to points on the lines then or thereafter owned or operated by the Telegraph Co. or its subordinate companies in the Telegraph Co.'s general telegraph system beyond or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the regular day rates of the Telegraph Co. between the points at which said messages should originate and the points to which they might be destined; the Railroad should pay to the Telegraph Co. one-half of its aforesaid rates on all such messages in excess of said amount, settlements to be made yearly; the free telegraphic service provided for in said contract should apply only to the transmission of messages concerning the operation and business of the Railroad's railroads covered by said contract, and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad, the tolls on which messages should properly be chargeable to such customers.

(11) The Railroad should transport free of charge over its railroads, on application of the Telegraph Co., all employees of the latter when traveling on its business or engaged in its work along said railroads, and transport and distribute free of charge all poles

70 and other material and supplies of the Telegraph Co., for the construction, maintenance, renewal and reconstruction of said telegraph lines covered by said contract, along said railroads, and also all material and supplies for the establishment, maintenance and operation of the offices of both parties to said contract upon said telegraph lines at places along said railroads; that the Railroad should transport free of charge the employees of the Telegraph Co. when traveling on its business or engaged in its work, and the materials and supplies of the Telegraph Co. required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Co. other than those above referred to, whether on or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the current transportation rates of the railroad, and the Telegraph Co. should pay to the Railroad one-half of its aforesaid rates on all such transportation of employees and material in excess of said amount, settlements to be made yearly.

(12) The Telegraph Co. should pay to the Railroad the sum of $60,000 per annum, in equal installments of $5,000 at the close of each month during the continuance of the contract, accounting from October 15, 1887.

(13) The Railroad should not be responsible for and the Telegraph Co. should indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Co. while being carried free or at half rates over said railroads under said contract, and should likewise indemnify the Railroad from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Co. and on account of any other public telegraph business, and the Telegraph Co. should not be responsible for and the Railroad should indemnify against any loss or damages of

71 any kind arising from or on account of any error or default in the transmission or delivery of any and all messages sent for the Railroad under said contract. * * *

(15) The provisions of said contract should apply to any new extensions or branches built or other railroads acquired by the Railroad, and to the telegraph lines thereon, to the same extent as if such lines and railroads had been originally included in said contract, and if there should be no telegraph line on any such roads, then the Telegraph Co. should furnish material and construct one thereon and maintain, repair and reconstruct the same, the Railroad furnishing the unskilled labor therefor; the Telegraph Co. should set apart on any such railroads, for the Railroad's business, one exclusive railroad wire; if the Railroad should acquire a telegraph line on any such road, the Railroad should sell and the Telegraph Co. should purchase such telegraph line on a valuation to be agreed upon; upon all such extensions, branches and leased, controlled or thereafter acquired roads, the Railroad should be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of paragraph Tenth of the contract on the railroads originally covered by said contract, and the $10,000 per year limit

of free telegraphic service, as provided by the second clause of paragraph Tenth, should be increased $6 per annum for each mile of such road occupied by the Telegraph Co.'s lines upon such extensions, branches, leased, controlled or thereafter acquired roads; the Telegraph Co. should be entitled to free transportation service for employees and material to the same extent, for use thereon and in the same manner as provided by the first clause of paragraph Eleventh of said contract, and the $10,000 per annum limit for free transportation provided for by the second clause of said paragraph
72 Eleventh should be increased $6 per annum per mile of such road occupied as aforesaid.

(16) The Railroad granted and agreed to assure to the Telegraph Co. the exclusive right of way, on, along and under the lands, roads and bridges of the Railroad and any extensions and branches and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business; the Railroad would clear and keep clear said right of way of obstructions to the construction and maintenance of the lines and wires provided for in said contract; the Railroad would not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or any telegraph or telephone line in competition with the lines or business of the Telegraph Co. except for the Railroad's current legal rates, nor would it furnish for any competing line any facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute its material therefor at other than regular stations, so far as such refusal and limitation of transportation might be lawful, but that the Railroad should not be required to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than the telegraph lines then existing and renewals thereof, upon said railroads and the additional wires that might be placed thereon and the lines provided for on extensions, branches and acquired roads. * * *

(18) The telegraph lines covered by said contract should form part of the general telegraphic system of the Telegraph Company and be controlled and regulated by it, and it should fix and determine all tariffs for the transmission of messages and of
73 connections with other lines and interests; no wire then or thereafter owned, leased, controlled, or used by the Railroad should at any time be used or employed directly or indirectly in competition with the Telegraph Co. by or for any party other than the Railroad and the Telegraph Co. and the Railroad should not at any time during the continuance of the contract engage in or transact any commercial or public telegraph business excepting for the Telegraph Co. under the provisions of the contract.

(19) The management and control of the railroad employees, so far as engaged in telegraphic duties upon said railroads, and of the employees of the Telegraph Co. engaged in the maintenance, repair, renewal and reconstruction of said telegraph lines along said railroads and the transportation of men, material and supplies therefor,

should be vested in a competent joint superintendent of telegraph, who should be appointed and whose salary should be fixed by the Railroad, with the approval of the Telegraph Co., which salary should be paid equally by the Railroad and the Telegraph Co.; that said joint superintendent should be removable for cause by either party and should be subordinate to and under the control of the Telegraph Co. so far as necessary to enforce its rules, regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of its lines, and the transaction of the commercial telegraph business upon said railroad; said joint superintendent should also be subordinate to and under the control of the Railroad so far as necessary to enforce its rules, regarding the maintenance, management and operation of its exclusive railroad wires, and that he should cooperate with both parties in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon, and that the Railroad should furnish office room and
74 light and fuel therefor for said joint superintendent and that each party should supply the clerical force for its own business.

(20) * * *

(21) Said contract should terminate all previous agreements between the parties, should continue in force for fifty years from October 15, 1887, and might be renewed after the expiration of such term for further terms of fifty years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the preceding period, and a violation of any of the provisions of the agreement by either party, while entitling the other to a claim for damages and the usual remedies for specific enforcement, should not be held to void the agreement or to abrogate the obligations or the undertakings of either party thereto.

The so called Hepburn Act approved June 29, 1906, amended section 6 of the "Act to Regulate Commerce" of 1887 (familiarly called the Interstate Commerce Act) so as to provide, among other things: "nor shall any carrier charge or demand or collect or re-"ceive a greater or less or different compensation for such transporta-"tion of passengers or property or for any service in connection "therewith between the points named in such tariffs than the rates, "fares and charges which are specified in the tariff filed and in ef-"fect at the time."

On December 21, 1906 the Interstate Commerce Commission announced its report "In the Matter of Railroad-Telegraph contracts" 12 I. C. C. Reps. Vol. XII, p. 10, in which it affirmed and construed its previous rulings of September 5th and October 12th, 1906 and stated, among other things, that "the Commission knows of no provision in law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground to dif-
75 ferentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers."

The Commission further held that contracts with telegraph com-

panies could be lawfully entered in so far as they affect "on line" service.

On June 3, 1907 the Commission announced its Administrative Ruling No. 219, in which it referred to and amplified its previous rulings in respect of the subject matter here under consideration. On November 15, 1907 the Commission announced that its ruling No. 219 applied to telephone service and called upon carriers that had not already done so, to file with the Commission copies of all contracts for telegraph or telephone service on their lines and, as a result, all of the contracts then existing between the railroad companies and the telegraph companies throughout the United States for the exchange of services, were thereupon filed with the Commission and have since remained on file. In view of the ruling of September 15, 1906, the plaintiff, on October 1, 1906, informed the defendant that it would not further perform the contract so far as it affected "off line" services and in 1908 defendant filed a bill against plaintiff in the United States Circuit Court for the District of Maryland, praying that a decree might pass adjudging the contract to be in full force and effect and that the railroad specifically perform the same. An answer was duly interposed and by leave of the court the Interstate Commerce Commission, through its solicitor, submitted and filed a brief as amicus curiae and argument was heard by the court. Before the court rendered any decision the Congress enacted an act approved June 18, 1910, entitled "An Act to Create a Commerce Court and to Amend the Act entitled 'An Act to Regulate Commerce' approved February 4, 1887, as heretofore amended, and for other purposes," which extended the provisions of the Interstate Commerce Act to telegraph, telephone and cable companies
76 and amended section 1 of the Interstate Commerce Act so that it contained, among other provisions, the following: (the additions being underlined)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided, further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services."

* * * * * * *

"No common carrier subject to the provisions of this Act shall

after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free tickets, free pass or free transportation for passengers except to its employees * * * Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit
77 the privilege of passes or franks, or the exchange thereof with each other for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act."

After the act became law, the parties, acting on the belief that the intent of the statute was to permit the continued performance by them of all the obligations under the contract, consented to the withdrawal of the suit in Maryland and the court permitted such withdrawal. The parties thereupon proceeded to carry out the contract in accordance with it- terms until about April 25, 1916, when defendant refused to perform the provisions of the contract in respect of "off line" services, in view of a conference ruling of the Interstate Commerce Commission dated March 28, 1916, and plaintiff was notified by defendant that it would continue to carry out its contract in such regard only in the manner indicated by such ruling. This ruling was as follows:

"Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an
78 enchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

The answer of defendant in the suit at bar admits the allegations

of the complaint, alleges the facts as to the extent of defendant's telegraph system, and further sets forth that defendant, in view of certain rulings of the Interstate Commerce Commission and of the many and severe penalties which would attach should it do otherwise, and should such rulings be held to express the correct interpretation of the statute, felt compelled to refuse performance in the particulars named in the complaint although otherwise willing to carry out such contract in accordance with its terms. When the cause came on for hearing it was suggested by counsel that the Interstate Commerce Commission should be invited to participate, through its solicitor, as amicus curiæ and thus this suggestion having been approved by the court, an invitation accordingly was extended by the court to the Interstate Commerce Commission and that invitation was promptly and courteously accepted, with the result that a brief has been filed on behalf of the Interstate Commerce Commission and counsel, upon its behalf, has also participated in the argument, the understanding being that defendant will appeal if so advised and requested by the Interstate Commerce Commission.

79 MAYER, *District Judge:*

The Complaint sets up a cause of equity under the authority of such cases as Bank of Kentucky v. Stone et al., 88 F. R. 383, and United States Life Ins. Co. v. Cable, 98 F. R. 761.

The question here under consideration is the meaning of the expression "the exchange of services" as found in the Act approved on June 18, 1910.

The contract between these parties is typical of contracts between railroad companies and the Telegraph Co. throughout the United States and the importance of the question may be realized when it is stated that the telegraph lines operated and controlled by defendant comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire, that defendant has nearly 25,000 offices, about 20,000 of which are railroad offices, yielding revenues too small to pay for maintenance separate and apart from the advantage derived from contracts with the railroad companies and that a very large part of defendant's system is constructed in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad systems, all such contracts being similar in their underlying provisions with that between the parties to this suit.

Whether the meaning of the "exchange of services" is determined by (*a*) the narrow test of verbal literalism or (*b*) the broader rule of ascertaining the intention of the Congress "from the language used in the act and * * * by a resort to the history of the times when it was passed" (United States v. Trans-Missouri Freight Association, 166 U. S. 290, 318), the result is the same.

(*a*) "Exchange" has a well settled meaning in common acceptation. Webster's definition is "The act of giving or taking one thing for another which is regarded as an equivalent; as an exchange of cattle for grain"; but, while the trader may, for purposes of his own calculation, put his own value on his cattle or his

80 grain, the transaction as between the parties is not measured in money. The owner of the cattle wants grain, while the owner of the grain wants cattle and each is satisfied to exchange the thing for the thing instead of agreeing that the market value of the cattle is so much per head and the market value of the grain so much per bushel and exchanging on the exact basis of multiplying the unit by the number of heads or the number of bushels intended to be transferred one to the other.

This popular meaning of "exchange" used and understood in the common speech of people has been accepted and defined by codes and courts. No more apt nor concise definition can be found than that in the Civil Code of Louisiana (Article 2660): "Exchange is a contract, by which the parties to the contract, give one to the other, one thing for another, whatever it be, except money; for in that case it would be a sale." See also Civil Codes of California §1804, North Dakota, §6003, South Dakota, §1348 and Montana §5129. And the courts in one form of phraseology or another seem to have uniformly followed the definition of exchange given by Judge Story in Buffum v. Merry, 4 Fed. Cases 605, "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more properly an exchange." Elwell v. Chamberlin, 31 N. Y. 611, 624; Cooper v. The State, 37 Ark. 412, 418; Chapman v. Hughes, 134 Cal. 641, 657; Forkner v. The State, 95 Ind. 406; Beardsley v. Cottrell & Babcock, 43 Ia. 194; Laboree v. Klosterman, 33 Neb. 150; Vail v. Strong, 10 Vt. 457, 467; Long v. Fuller, 21 Wis. 121, 124.

"Exchange of services" therefore, clearly refers to the kind of services which the railroad can render to the telegraph company and vice versa, in connection with the business of transmitting intelligence by telegraph for the railroad company or of transport-

81 ing men and material for the Telegraph Co., as the case may be. To say that the exchange must be on the basis of the lawful tariff rates of the Railroad and of the reasonable charges of the Telegraph Co., regularly charged other customers for similar services, is but another way of asserting that the proviso of the statute is without meaning. A statute was not necessary to figure out the service in this way, for such a method merely means that the Railroad in return for $100 worth of transportation at lawful rates may be paid by $100 worth of telegraph transmission charged at the reasonable and non-discriminatory rates secured by the statute—all of which could be done without the or any proviso, as a mere matter of bookkeeping; and, if it was intended that upon such a method of calculation any excess of services by the Railroad over the services of the Telegraph Co. or vice versa, should be paid for by virtue of the statute, then the Railroad and the Telegraph Co. were placed in no different relation with each other than they were with any one else and, hence, the proviso was meaningless and useless—a conclusion always avoided in construing a statute.

The views stated supra lead to the same result (although arrived at on a different theory) as the Commission applied to "on line"

service in its Conference ruling of March 28, 1916. In that ruling, the Commission sought to distinguish between "on line" and "off line" service and such is now the position of its counsel. The argument is thus stated:

"Where a railroad company transports free or at reduced rates the men or material of a telegraph company engaged or to be used in the construction of telegraph facilities along the lines of the railroad, it is performing for the shipper a service so closely analogous to the transportation of its own employees and property as not to transcend the spirit of the Act. So also, where a telegraph company transmits the messages of a railroad company between points
82 along the lines of the railroad, it is performing a service which the railroad, but for the contract of exchange, would have to perform for itself, and the performance of such services by the telegraph company free or at reduced rates is not in contravention of the statute. * * *

Where a railroad company, however, transports the men or material of a telegraph company for the construction or maintenance of service off the lines of the railroad, or where the telegraph company transmits the messages of the railroad to or from points off its lines, each company is performing for the other a service practically identical with the service which each respectively renders for the public. For either of such carriers to render such services at other than the regularly published rates and reasonable charges prescribed in the Act would be to discriminate against other shippers, passengers, and senders of telegrams not so favored."

But there is nothing in the statute nor in its "spirit" which justifies this distinction. The Congress by appropriate and concise language could have differentiated between "on line" and "off line" services. On the contrary, however, its words "the exchange of services" were of the broadest character and without limitation as to whether the "services" were "on line" or "off line"; and it is significant that in a statute bringing in telegraph, telephone and cable companies for the first time and having as one of its important features the safeguarding of the public against discrimination, so pronounced an exception should be made without qualifications of any kind, in respect of contracts with common carriers, "for the exchange of services."

(*b*) Where, in addition to the language of the statute, considered by itself, the intention of the Congress is sought in
83 the light of relevant history, the construction already indicated is amply confirmed.

As counsel for defendant said in the suit in Maryland between these same parties: "The railroad and the telegraph are the Siamese Twins of Commerce, born at the same period of time, developed side by side, united by necessity; and * * * what the laws of trade and usage have thus joined together it could not have been the purpose of Congress to put asunder * * *."

Since the middle of the last century the railroads and the telegraph company entered into the relations illustrated by the contract

here under consideration and, as in this case, these contracts have been renewed from time to time, their duration being for long periods of years, all looking to the establishment of a settled status and modus vivendi by virtue of the very nature of the contract and the business and operating relations of the parties.

At the outset, it is apparent that the contract contains important provisions so interwoven and so interdependent that it must be regarded as an entire contract. Obviously such a contract is entered into only after the most careful consideration, involving an understanding of the practical and financial results to each of the parties. The provisions as to rights of way, joint superintendency and the like, and the value of the services each to the other, including, among other things, the payment by the Telegraph Co. to the Railroad of $60,000 per annum, all demonstrate that the exchange of railroad service as such for telegraph service as such, rests on the other mutual obligations secured by the contract. That this was known and appreciated by the Commission appears fully from its rulings. With its knowledge, based upon comprehensive experience in regard to and understanding of administrative features and effects, the Commission clearly indicated that its rulings were based solely on its interpretation of the statutes and not upon any detrimental
84 results which would follow from the interpretation contended for by the railroads and the telegraph companies.

In its Twenty-first Annual Report to the Congress dated December 23, 1907, the Commission referred to its rulings made up to that time and stated its views in the language of its ruling of December, 1906, a significant part of which was:

"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely."

In its Twenty-second Annual Report to the Congress dated December 24, 1908, the Commission again referred to its rulings and reports in respect of this subject matter.

The Annual Report of 1909 made no reference to the subject matter and, although dated December 21, 1909, there is nothing to show when or if it was laid before the Sixty-first Congress which reconvened January 4, 1910, and adjourned sine die June 25, 1910.

The Sixtieth Congress was not in session at the date of the 1908 report and, as it held a session of only two months in the winter of 1909, it probably had no opportunity to consider the Report of 1908.

It may, however, fairly be assumed that the Sixty-first Congress gave consideration to the reports of 1907 and 1908 from the administrative body peculiarly equipped to inform it in respect of matters coming under its (the Commission's) observation.

Aldridge v. Williams, 3 How. 9;
United States v. Union Pacific R. R. Co., 91 U. S. 72, 79;
United States v. Trans-Missouri Freight Association, supra.

85 The bill creating the Commerce Court in which the amendment of 1910 was incorporated, was an elaborate measure and the proviso here considered could not have been evolved from inner consciousness nor suddenly have been flashed from a clear sky.

Resort to the Commission's reports and to the contracts on file then showed, as it does now, that the Commission apparently reluctantly had made a sort of divided ruling going as far as it felt it could in preserving the integrity of these contracts and going no further only because of its interpretation of the applicable statutes, but contemporaneously announcing most affirmatively that the full performance of the contracts would not affect any public or private interest adversely. Further, this ruling was not accepted nor acquiesced in and, in the absence of clear and explicit language, it seems idle to contend that the Congress was merely incorporating the rulings of the Commission in the statute distinguishing between "on line" and "off line" services when inter alia, under its jurisdiction as to carriers, the Commission had already recognized the lawful character of the contracts as affecting "on line" services and, when the Congress, almost by *by* virtue of lay knowledge, must have appreciated that "off line" service may be as vital to telegraph or railroad operation "on line" as "on line" service.

Thus, if a bridge has been swept away at A, on the line of the railroad, is it any less vital to telegraph that intelligence to a connecting carrier at B off the line, than to the railroad's agent at C on the line; or if a telegraph wire has been destroyed at A at a point one yard off the line, is it any less vital for the railroad to transport men and material to replace the destroyed wire than to do the same transportation to replace the same destroyed wire at B on the line, one yard this side of A? That the courts will not take so narrow or differentiated a view of the statute as to answer these questions in the affirmative has already been indicated by United States
86 v. Erie Railroad, 235 U. S. 513, and United States v. Erie Railroad, 236 U. S. 259.

In addition to these considerations, it is further fair to assume that the Congress had knowledge of the necessarily intimate relation between the railroads and the telegraph companies as shown by its own Acts and the decisions of courts.

Pacific Railroad Act of July 1, 1862 (12 Stat. at Large, 489).

Texas & Pacific Incorporation Act of 1871 (16 Stat. at Large, 573).

Indian Reservation Railroad Act of 1899 (30 Stat. at Large, 990).

Enid, etc., Railroad Act of 1902 (32 Stat. at Large, 43).

United States v. Union Pacific Ry. Co., 160 U. S. 1.

St. Paul, M. & M. Ry. Co. v. Western Union Telegraph Co., 118 Fed. 497.

United States v. Northern Pacific R. R. Co., 120 Fed. 546;

Western Union Telegraph Co. v. Pa. R. R. Co., 195 U. S. 540;

Western Union Telegraph Co. v. Pa. R. R. Co., 129 Fed. 849.

It is unnecessary to elaborate further upon additional facts and arguments advanced by the parties in support of the contention that the Conference Ruling of March 28, 1916, cannot be sustained. But there are some significant observations in the opinion of Mr. Justice McKenna in United States v. Erie Railroad, 236 U. S. 159, which are here serviceable.

First. As concisely stated in the headnote "A ruling of the Interstate Commission which was never enforced—the custom of the carriers being uniformly the other way—cannot have the weight ordinarily accorded to the contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it.

87 Second. Analogously with the observation as to the interchange of passes that the Congress considered "that the best safeguard against its abuse was the interest of the carriers" and that the exercise of the right "has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them," it may be similarly said here that the exchange of services whether viewed in its comprehensive aspect or merely as an exchange of telegraph service as such for railroad service as such, is based on business policies providently entered upon and safeguarded by self interest and so the Congress must have realized. The contracts do not provide for "free" services in the true sense, they are not within the evil which evoked remedies against practices such as are discussed in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, and Chi. Ind. & L. Ry. Co. v. United States, 219 U. S. 486, but they are, indeed, sui generis, entitled in the interest both of the public and the parties to be completely performed in accordance with their provisions and in accordance with what seems undoubtedly to have been the intent of the statute.

It follows that plaintiff may have a decree as prayed for.

JULIUS M. MAYER,
District Judge.

February 19, 1917.

Settle decree on notice to all counsel who participated in the argument.

——— ———,
U. S. D. J.

88 *Assignment of Errors. Filed March 2, 1917.*

United States District Court, Southern District of New York.

In Equity.

No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Comes now the Defendant, and files the following assignment of errors upon which it will rely upon its appeal from the decree made by this Honorable Court on the 28th day of February, 1917, and filed in the office of the Clerk of the above Court on said date:

I.

The Court erred in finding that the contract dated October 15th, 1887, between complainant and defendant, a copy of which is attached to the bill of complainant as Exhibit A, is lawful and binding upon the parties thereto, and still in full force and effect in all of its provisions notwithstanding the Conference Ruling of March 18th, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant herein in respect of such contract or agreement or in asserted compliance with such ruling.

II.

The Court erred in ordering that the defendant specifically perform said contract of October 15th, 1887, between complainant and defendant.

89 III.

The Court erred in ordering that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15th, 1887, between complainant and defendant.

IV.

The Court erred in finding that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

as used in Section 1 of the Act to Regulate Commerce as amended June 18th, 1910, (U. S. Comp. Stat. §8563 subd. 3) authorizes the

making of contracts, or the continued performance of the contract theretofore made, between the complainant railroad company and the defendant telegraph company, dated October 15th, 1887, by the terms of which said companies agree to exchange services upon bases other than the basis of the lawful rates of said railroad company, as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said telegraph company regularly charged other customers for similar services.

V.

The court erred in making and entering a decree in favor of complainant and against defendant.

In order that the foregoing assignment of errors may be and appear of record, the defendant presents the same to this Honorable Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such cases made and provided, and defendant prays a reversal of the said decree made and entered by said Court.

March 1, 1917.

RUSH TAGGART,
Solicitor for Defendant,
195 *Broadway, New York City.*

90 *Citation and Proof of Service. Filed March* 2, 1917.

To the Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be held at the Borough of Manhattan, City of New York, in the Southern District of New York, in the Circuit above named, on the 5th day of March, 1917, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein The Western Union Telegraph Company is appellant and you are appellee, to show cause, if any there be, why the errors in said appeal above mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, City of New York, in the District and Circuit above named, this 2d day of March in the year of our Lord, one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred*th* and forty-first.

MARTIN T. MANTON,
Judge of the United States District Court,
Southern District of New York.

Service of a Copy of the within citation is admitted this 2d day of March, 1917.

WHITE & CASE,
Solicitors for Complainant.

91 *Stipulation.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the record herein numbered from pages 1 to 93, both inclusive, contains all of the records, papers and documents in this action that are necessary and material upon review of the decree herein by the Circuit Court of Appeals for the Second Circuit, and that the same may be certified by the Clerk of the United States District Court to the Appellate Court as the complete return herein upon which the appeal may be heard; that the filing of a præcipe is hereby waived and that the appeal herein be placed upon the calendar of the United States Circuit Court of Appeals for the Second Circuit for the term thereof commencing March 5th, 1917.

March 1, 1917.

WHITE & CASE,
Solicitors for Complainant.

RUSH TAGGART,
Solicitor for Defendant.

92 *Stipulation Waiving Filing of Bond for Costs.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the defendant-Appellant, the Western Union Telegraph Company, shall not be required to give a bond or undertaking for costs on appeal to the United States Circuit Court of Appeals for the Second Circuit, the Complainant-Appellee hereby waiving all requirements of the statutes or Rules of Court in that behalf.

March 1, 1917.

WHITE & CASE,
Solicitors for Complainant.

RUSH TAGGART,
Solicitor for Defendant.

93 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, upon the foregoing stipulation do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 3d day of March in the year of our Lord, one thousand nine hundred and seventeen and of the Independence of the United States the one hundred*th* and forty-first.

[L. S.] ALEX GILCHRIST, JR., *Clerk.*

94 United States Circuit Court of Appeals for the Second Circuit.

Before: Hon. Henry Galbraith Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Appeal by Defendant from Final Decree in Equity Entered in the District Court for the Southern District of New York.

Rush Taggart for Western Union Telegraph Co., appellant; (Joseph W. Folk, solicitor for Interstate Commerce Commission filed a brief as amicus curiæ.)

J. Du Pratt White, for Baltimore & Ohio Railroad Co. (W. F. Brownell, as amicus curiæ, also argued for appellee.)

Per CURIAM: The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other, and the sole question presented in argument or

by assignment of error is whether under the Act to regulate
95 commerce as amended June 18, 1910, it is lawful for railway and telegraph companies to observe the terms of a contract made between them, (and lawful when made) long before passage of the statute referred to. We express no opinion on any other point.

The District Court (Mayer, J.) has written an ample and correct statement of facts taken from the pleadings,—the hearing below having been on bill and answer. With the premises and conclusions of the trial Judge we agree.

The railroad and the telegraph became instrumentalities of commerce at substantially the same time. They advanced hand in hand, and agreements by which each agreed to serve the other for the common benefit have been known and observed for more than two generations. Indeed they long ago became but parts of one system,—so far as the public was concerned.

The parties hereto made a written agreement in 1887, which is still unattacked except in one point, which may be summarized as follows: The Railroad Company transports men and material, and furnishes labor to the Telegraph Company without limit so far as the erection and maintenance of the telegraph system on the railroad company's property is concerned. The Telegraph Company in turn transmits orders and intelligence along the Railroad Company's property also without limit, so far as the maintenance and
96 traffic management of the railroad is concerned; and each Company further serves the other with regard to that other's business in respect of business matters not directly connected with the line of railroad along which the telegraph lines extend.

These two kinds of work are commonly known, the former as "on line" business, the latter as "off line" business.

At stated periods the amount of "off line" business transacted by each for the other is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half of the ordinary rates of each party to the agreement. The right to do this is the only question in this case.

Not until the amendment of 1910 were telegraph companies subject to the commerce acts, and the jurisdiction of the Commission. By a proviso in that statute it was declared that

"nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method or amount of exchange. The agreement being to exchange the carriage of goods against the transmission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course.

97 If it were shown that this contract or any other agreement, were being used as a cover for injuring one party or the pub-

lic, other rules would apply. Nothing of the kind being suggested, the decree is affirmed.

98 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Baltimore & Ohio R. R. Co. vs. Western Union Tel. Co. Opinion per Curiam.

99 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 14th Day of May, One Thousand Nine Hundred and Seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

v.

WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

100 Endorsed: United States Court of Appeals, Second Circuit. B. & O. R. R. v. Western Union Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 14, 1917. William Parkin, Clerk.

101 United States Circuit Court of Appeals for the Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

The above named defendant-appellant The Western Union Telegraph Company, conceiving itself aggrieved by the order and decree made and entered by the above named court, in the above entitled cause, under date of May 14th 1917, wherein and whereby it

was ordered, adjudged and decreed that a certain order and decree made in the above entitled cause under date of February 28, 1917, be affirmed, wherein it was decreed that a certain contract dated October 15, 1887, between the complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint herein as Exhibit "A," is lawful and binding upon the parties thereto, and is still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission; that the defendant-appellant specifically perform said contract; that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract; and that the provisions of the Act to Regulate Commerce as amended June 18, 1910, (U. S. Com. Stat. Sec. 8563, sub. div. 3) authorizes

102 the making of contracts, or the continued performance of contracts theretofore made, between the complainant Railroad Company and the defendant Telegraph Company, by the terms of which said companies agree to exchange services upon bases other than their regular tariff rates; and this being a case in which a judgment or decree of the said Circuit Court of Appeals is not made final, and that the matter in controversy in this suit exceeds $1,000, besides costs; does hereby appeal from the said order and decree of affirmance dated May 14th 1917, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record, proceedings and papers in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

RUSH TAGGART,
Solicitor for Defendant-appellant.

103 United States Circuit Court of Appeals for the Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Upon the foregoing petition it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed.

C. M. HOUGH,
United States Circuit Court Judge.

104 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. Petition and Order for Appeal.

Rush Taggart, Esq., Attorney for Defendant-appellant.

Service of a copy of the within petition and order is this day admitted. Dated May 25, 1917. White & Case, Attys. for Complt.-respdt.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

105 United States Circuit Court of Appeals for the Second Circuit.

In Equity.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Assignment of Errors.

The appellant in the above entitled cause in connection with its petition for appeal herein presents and files therewith its assignment of errors as to which matters and things it says that the decree entered herein on the 14th day of May, 1917, is erroneous ,to-wit:

I.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York, on the 28th day of February, 1917, wherein that Honorable Court found that the contract dated October 15, 1887, between complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint as Exhibit "A," is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant-appellant herein in respect of such contract or agreement or in asserted compliance with such ruling.

106 II.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant specifically perform said contract of October 16, 1887, between complainant-appellee and defendant-appellant.

III.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th

day of February, 1917, wherein that honorable Court ordered that the defendant-appellant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15, 1887, between complainant-appellee and defendant-appellant.

IV.

The Court erred in affirming the decree of the United States District Court for the Southern District of New York, made on the 28th day of February, 1917, wherein that Honorable Court found that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service"

as used in Section 1 of the Act to Regulate Commerce, as amended June 18, 1910, (U. S. Comp. Stat. Sec. 8563, sub. div. 3) authorizes
the making of contracts or the continued performance of the
107 contract heretofore made, between the complainant-appellee Railroad Company and the defendant-appellant Telegraph Company, dated October 15, 1884, by the terms of which, said companies agree to exchange services upon bases other than the basis of the lawful rates of said Railroad Company as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said Telegraph Company regularly charged other customers for similar services.

V.

The Court erred in making and entering a decree affirming the decree of the court below.

VI.

The Court erred in not reversing the decree of the court below.

Wherefore the appellant prays that said decree may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified.

Dated, May 24, 1917.

RUSH TAGGART,
Solicitor for Defendant-appellant,
195 *Broadway, New York City, N. Y.*

108 Endorsed: United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. In Equity. Assignment of errors. Rush Taggart, Esq., Solicitor for Defendant-appellant, 195 Broadway, New York City, N. Y.

Gr'd. C. M. H., U. S. C. J.

Service of a copy of the within assignment of errors is this day admitted. Dated May 25, 1917. White & Case, Attys. for Complt. Respt.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

109 American Surety Company of New York.

Capital $5,000,000.

United States Circuit Court of Appeals for the Second Judicial Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Know all men by these presents, That we, Western Union Telegraph Company, as Principal, and the American Surety Company of New York, as Surety, are held and firmly bound unto the above named The Baltimore & Ohio Railroad Company, in the sum of five hundred and 00/100 dollars ($500.00), to be paid to the said The Baltimore & Ohio Railroad Company, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of May, one thousand nine hundred and seventeen.

Whereas, the Western Union Telegraph Company has prosecuted an appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals, Second Judicial Circuit, entered on or about the 14th day of May, 1917, in the above entitled suit:

Now, therefore, the condition of this obligation is such, That if the above named Western Union Telegraph Company shall prosecute said appeal to effect, and if it fails to make its plea good, shall answer all damages and costs that may be awarded against it, then this obligation to be void, otherwise to remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY.
By ANDREW F. BURLEIGH.
AMERICAN SURETY COMPANY OF NEW YORK.
By MARSHALL L. BROWER,
Resident Vice President.

Attest:
[L. S.] LOUIS PAPEN,
Resident Assistant Secretary.

94935.

110 STATE OF NEW YORK,
County of New York, ss:

On the twenty-fifth day of May in the year 1917, before me personally came Andrew F. Burleigh to me known, who being by me duly sworn, did depose and say: that he resided in —— that he is the President of Western Union Telegraph Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[NOTARIAL SEAL.] C. A. VAN BRUNT,
Notary Public Kings County, No. 6.

Certificate filed in New York, No. 14.
My commission expires 3/30/18.

110½ STATE OF NEW YORK,
County of New York, ss:

On this 20 day of May, 1917, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in The City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[L. S.] C. A. STUMPF,
Notary Public.

New York County No. 853. Reg. 9066.
Bronx County No. 1. Reg. 907.
Kings County No. 111. Reg. 9116.
Certificates filed in Dutchess, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester Counties.
Commission expires March 30, 1919.

111 STATE OF NEW YORK,
County of New York, ss:

Louis Papen being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

LOUIS PAPEN.

Subscribed and sworn before me this 24 day of May, 1917.
[L. S.]
C. A. STUMPF,
Notary Public.

New York County No. 853. Reg. 9066.
Bronx County No. 1. Reg. 907.
Kings County No. 111. Reg. 9116.
Certificates filed in Dutchess, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester Counties.
Commission expires March 30, 1919.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement March 31, 1917.

Resources.

Real Estate:			
Home Office Building and Land, unencumbered	$3,200,000.00		
N. Y. City Water Front, unencumbered	215,000.00		
Appraised value by N. Y. Insurance Dept.		$3,415,000.00	
Stocks and Bonds, Market Value		3,926,410.63	
Special Reserve Fund Investment		250,000.00	
Mortgage and Collateral Loans, Judgments and Decrees		834,979.19	
Cash in Banks and Offices		1,133,651.32	
Interest in Excise Reinsuring Fund		72,631.95	
Premiums in Course of Collection	$961,042.43		
Less amount 3 months or more old	298,892.70		
		662,149.73	
Accrued Interest and Rents		48,012.19	
Salvage Recoverable		110,105.94	
			$10,452,940.95

Form G 362—*Continued.*

Liabilities.

Capital Stock	$5,000,000.00	
Surplus and Undivided Profits	1,785,325.01	
Special Reserve	250,000.00	
Reserve for Unearned Premiums	2,296,606.80	
Reserve for Contingent Claims	748,234.75	
Reserve for Expenses and Taxes	272,800.00	
Reinsurances and Accounts Payable, not due	34,267.24	
Premiums Paid in Advance	65,707.15	
		$10,452,940.95

Special Deposits, required by insurance laws of various States, not considered.

113 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 16, 1917, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,

American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 12, 1916, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *.

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Marshall L. Brower.	Marshall L. Brower.
	A. E. Cotterell.	William H. Bishop.
	William M. Tomlins, Jr.	A. E. Cotterell.
	Lester S. Moore.	Charles S. Waterbury.
	William H. Bishop.	Daniel Stewart.
	George R. Crosby.	E. D. Sadler.
	W. H. E. Reinecke.	George R. Crosby.
	E. D. Sadler.	W. H. E. Reinecke.
		E. J. Sabater.
		Louis Papen.
		Benjamin A. Willis.
		Robert L. Neptune.
		Peter H. May.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to

any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 23rd day of January, 1917.

(Signed) W. H. RILEY,
[L. S.] *Assistant Secretary.*

114 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Plaintiff, against Western Union Telegraph Company, Defendant. Appeal Bond.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

I approve of the within undertaking both as to form and sufficiency of the surety. C. M. Hough, C. J. 5/25/17.

Service of a copy of the within appeal bond is this day admitted together with approval thereof. Dated May 25, 1917. White & Case, Attys. for Complt.-Respdt.

115 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 114 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Baltimore & Ohio Railroad Company against Western Union Telegraph Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, in the Second Circuit, this 29th day of May in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

116 The United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES OF AMERICA, *ss:*

To the Baltimore & Ohio Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Western Union Telegraph Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the Supreme Court, the 25th day of May, in the year of our Lord, One thousand Nine Hundred and Seventeen.

—— ——.

Allowed by
C. M. HOUGH,
Judge United States Circuit Court
of Appeals, Second Circuit.

117 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. Original Citation.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

Rush Taggart, Esq., Attorney for Defendant-appellant.

Service of a copy of the within citation is this day admitted. Dated N. Y. May 25, 1917. White & Case, Atty. for Complt.-respdt.

Endorsed on cover: File No. 26,021. U. S. Circuit Court Appeals, 2d Circuit. Term No. 554. The Western Union Telegraph Company, appellant, vs. The Baltimore & Ohio Railroad Company. Filed June 30th, 1917. File No. 26,021.

FILED
DEC 23 1919

In the Supreme Court of the United States.

October Term, 1919

No. 315

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Appeal from the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE WESTERN UNION TELEGRAPH COMPANY.

RUSH TAGGART,
Attorney for the
Western Union Telegraph Company.

LECOUVER PRESS CO., Printers, 31 Vesey St., New York, N. Y.

INDEX.

	Page
Character of Case	1-2
Introductory Statement	2-4
Effect of Interstate Commerce Act	4
Early Ruling of Commission	5
Ammendment of June, 1910	5-6
Ruling of July, 1914, and Effect	7-8
Action of R. R. Co. and Early Litigation	8-9
Action of Lower Courts	9-10
Assignment of Errors	10-12
Argument	12-16

APPENDIX.

Memo. in re "Uptown Offices"	16-23
Letters of Commissioner Harlan	23-25
Central Vermont Submission	26-36
Letter of Commissioner Prouty	36
Letter of Commissioner Clark	37
Memo. of Telegraph Co.	39-63
Letter of Acting Secretary Holmead	63
Letter of Inquiry to Commissioner Clark	64-68
Memo. of Telegraph Co. on Conference Ruling	68-82

STATUTES AND DECISIONS CITED.

PAGE

Interstate Commerce Commission's ruling of December, 1916 (12 I. C. C. Rep. 10), 4, 19, 24, 28, 49

Amendment, of June, 1910 ..... 5, 52

Conference Ruling of July, 1914 and March, 1916 ..... 7, 63

Conference Ruling 364.....24, 61, 65, 68

In re Express Contracts (16 I. C. C. Rep. 246) 50

Sec. 6, Hepburn Amendment..... 58

U. S. v. Erie R. R. Co., 235 U. S. 593..... 75

In the Supreme Court of the United States.

OCTOBER TERM 1918.
No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Western Union Telegraph Company, Appellant.

This appeal brings into this Court for review a decree of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the United States District Court for the Southern District of New York in an action wherein The Baltimore and Ohio Railroad Company was complainant, and The Western Union Telegraph Company, defendant.

The Baltimore & Ohio Railroad Company is a corporation of the State of Maryland. The Western Union Telegraph Company is a corporation of the State of New York, and the suit in addition to one being wholly between citizens of different

States, involves a construction of the Interstate Commerce Act of February 4, 1887, and some of the amendments thereof.

Under date of the 15th day of October, 1887, the telegraph company and the railroad company entered into an agreement relating to construction, maintenance and operation of telegraph lines along the system of railroads owned by the railroad company, for the period of fifty years from the date of the contract, with privileges of renewal for further terms in successive periods of fifty years each.

It may be proper to say by way of introduction, and as statement of the importance of the question involved in this case, that similar questions affect the working of the telegraph lines of the telegraph company, and the operation of the railways of practically 95 per cent. of the railroad mileage of the United States. Shortly after the introduction of the telegraph and the use of it as an efficient instrumentality of quick transmission of intelligence, the advantages of it in the operation of railways became apparent, and the development and construction of its lines were largely along the lines of railways, and under contracts by which the same system of wires was made available for commercial purposes for the public and the Government and for the railroad company in the transmission of intelligence relating to its railroad and for the expediting of traffic, both passenger and freight.

Such contracts had become practically universal long before Congress began to legislate respecting the regulation of railways in the Interstate Commerce Act of February 4, 1887. By means of such contracts The Western Union Telegraph Company had been enabled to establish practically a universal system of telegraphy reaching all parts of the country, and it is significant that of the 15,000 or more offices maintained by that company where

commercial messages could be sent at the time of the passage of the Interstate Commerce Act, over 12,000 of them were offices which could not have been thus maintained except by the instrumentality of its contracts with the railroad companies. These contracts fundamentally provide for contributions by each of the parties to the construction, maintenance and operation of the lines of telegraph, the most common being contribution by the telegraph company of the material, and a certain part of the labor known as the skilled labor, and by the railroad company of the unskillled labor, right of way, transportation of men and material. The portions in which these respective contributions were made vary in different contracts. The contracts provide for a division of the uses of the lines constructed, these varying in view of the changed conditions that obtain on different railways. Such contracts also provide that at stations where the railway company maintains a telegraph operator and office in connection with the movement of trains, that such operator shall receive and transmit for the telegraph company commercial messages, and thereby at a large number of stations which otherwise would be unable to obtain commercial service the public have obtained commercial service. Such contracts also provide as contributions on the part of the railroad company for transportation of employees of the telegraph company and also transportation of material, such material consisting of two classes; material used for repair and reconstruction of lines upon the lines of the railway company to which the contract applies, and a second class of material passing over those lines of railway to be used on other portions of the telegraph company's system in the United States. Such contracts usually provide that the railway messages between points on the line of railway

shall be transmitted over certain wires set apart for the use of the railway company by railway operators, but they also provide that messages relating to the railway company's business from points off the line of the railway to other points off the line of the railway will be transmitted by the telegraph company in amounts to be determined by calculating the messages at commercial rates, up to an amount named in the contract, and with provision that excess over such amounts shall be paid for at half such commercial rates.

When the Interstate Commerce Act was originally passed it was made applicable to railway companies alone, and such contracts were not considered as in any way inhibited, modified or qualified by any provision of the Act. Later, when what is known as the Hepburn Amendment was adopted in 1906 amending Section 6 of the Act and requiring railway companies to file tariffs, and prohibiting the transportation in any manner of any commodity except in accordance with tariffs on file, and prohibiting compensation for such transportation being received otherwise than in money, the question arose respecting the applicability of such Amendment to provisions of the telegraph contracts, and particularly with respect to transportation of material by the railway company for the construction, maintenance and reconstruction of the telegraph lines. Accordingly in December, 1906, The Western Union Telegraph Company and the Postal Telegraph Company each filed a petition to the Interstate Commerce Commission asking for an interpretative ruling respecting their rights under these contracts in view of the Amendment to Section 6 of the Act. After a full hearing, the Commission in December, 1906, made its ruling which is reported in 12th Interstate Commerce

Reports, page 10, in which a sharp line of demarcation was drawn between the transportation of telegraph company's material to be used upon the line of the railway transporting, and the telegraph company's material to be used off the line of the railway company transporting thereby creating a differentiation between so-called "on line" material and "off line" material.

As to the first, the ruling of the Interstate Commerce Commission was that this was not transportation such as the railway company would conduct for an ordinary shipper, but was a means whereby the railway company secured a facility for its own service and was therefore differentiated from an ordinary shipment, but that "off line" transportation of telegraph company's material did not differ from ordinary shipments, and therefore the telegraph company was under obligation to comply with the provisions of Section 6 to the Act, and that the railway company could not receive such shipment otherwise than upon payment of money at the regular tariff rates.

Following this ruling which was made a conference ruling, and promulgated as such, the telegraph company and the railway companies for the most part covered the situation by supplemental contracts by means of which there was practically a compliance with the ruling.

In June, 1910, there was a general amendment of the Act, and among other changes the telegraph, telephone and cable companies were brought within the provisions of certain sections of the Act and in the first section after such companies were subjected to the provisions of the Act with respect to its requirements as to reasonableness of the charges for service, it was:

"*Provided* that messages by telegraph, telephone or cable, subject to the provisions of this Act, may

be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages; *and provided further,* that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

With reference to the interchange of passes there was a provision also inserted in the first section of the Act that the general prohibition respecting free passes and free transportation should be qualified as follows:

"*And provided further,* that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act."

The provisions of Section 6 of the Act hereinbefore referred to were not made applicable to telegraph, telephone and cable companies. Following the amendment, questions arose very shortly respecting how far, if at all, the limitations which the Interstate Commerce Commission in its ruling of December, 1906, applied to the transportation of employees of the telegraph company by the railway company, and also with respect to the transportation of materials either "on line" or "off line." Some of these questions are presented in an appendix of this brief, which shows correspondence with the Commission relating to various contracts, and the questions submitted to the Commission which finally resulted on the 15th

of July, 1914, in a conference ruling agreed upon by the Commission reading as follows:

"Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services, 'a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad, or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

This ruling raised further questions respecting the matter which finally resulted in a request of the Commission to the telegraph company and representatives of some of the railway companies affected, to file memoranda and briefs, and in a further conference ruling of March 28, 1916, upon which no order was issued by the Interstate Commerce Commission; but this ruling of March 28, 1916, was in

the same terms as that of July, 1914, and the substance appears in the list of conference rulings of the Commission No. 219. This ruling it will be seen unsettled practically all the railway and telegraph contracts in the country by prohibiting the railway company from transporting any "off line" material except under the provisions of Section 6 of the Interstate Commerce Act, and at full local rates. The ruling also left the question uncertain as to how far, if at all, the telegraph company could carry out the provisions of a contract with respect to the transmission of messages upon its lines for the Railroad Company except at its full and regular commercial rates.

Prior to the amendment of June 28, 1910, and following the decision of the Interstate Commerce Commission of December, 1906, the Baltimore & Ohio Railroad Company had refused to carry out the provisions of the contract as to "off line" material, and the Telegraph company had brought its action in the United States Circuit Court for the District of Maryland to enforce that provision of the contract. The case had been argued and submitted, and was under consideration by the Court when the amendment of June, 1910, was adopted by Congress, providing, among other matters, "that nothing in this Act shall be construed to prevent telegraph, telephone and cable companies from entering into contracts with common carriers for the exchange of services." It was the view of both parties to the suit that this removed all disabilities with respect to the transportation of material, and thereupon the suit was dismissed without prejudice and both parties entered into the performance of the contract, and continued until the ruling of the Commission after the full hearing on the 28th of March, 1918, which, as we have seen, disabled the railway company from performing that

part of its contract obligations, and if the Interstate Commerce Commission's construction of the Act is the correct one, likewise disabled the telegraph company from performing a certain portion of the contract relating to the transmission of messages. Thereupon, following such ruling the telegraph company declined to carry out this provision of the contract and subject itself to the possible penalties involved in case the Interstate Commerce Commission's ruling was the correct one. Thereupon the railway company filed its bill setting forth the foregoing state of facts, and the position in which it found itself in respect to the contract, affirming that the Interstate Commerce Commission had misinterpreted in its ruling of March 28, 1916, the scope, force and effect of the provision in the Interstate Commerce Act, and that the railway company and the telegraph company were not prohibited from carrying out these provisions of the contract affected by the ruling by reason thereof, and thereupon asking the Court to construe the Act, and define the rights of the parties under the contract, and to adjudge and decree that the Western Union should be perpetually enjoined from violating the provisions of the contract in respect to its obligation to transmit the messages of the railway company as provided in the contract.

The case came on for hearing in the District Court, and in view of the ruling which had been made the Counsel of the Interstate Commerce Commission was invited to participate, and the Court ordered that he be heard, and that the telegraph company should appeal if so requested by the Interstate Commerce Commission in order that a final determination might be had of the highest tribunal respecting the question which was thus presented for determination. The District Court found in

favor of the construction of the Act contended for by the railway company, and which had also been contended for by the telegraph company, as will appear from the appendix and the correspondence therein contained with the Interstate Commerce Commission respecting this question. The telegraph company thereupon in accordance with the understanding arrived at in the District Court, appealed to the Circuit Court of Appeals for the Second Circuit, and upon that appeal the Court of Appeals affirmed the ruling of the District Judge. Thereupon the telegraph company brought the case into this Court.

Assignment of Errors.

"I. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York, on the 28th day of February, 1917, wherein that Honorable Court found that the contract, dated October 15, 1887, between complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint as Exhibit "A," is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant-appellant herein in respect of such contract or agreement or in asserted compliance with such ruling.

"II. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant specifically perform said contract of October 16, 1887, between complainant-appellee and defendant-appellant.

"III. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15, 1887, between complainant-appellee and defendant-appellant.

"IV. The Court erred in affirming the decree of the United States District Court for the Southern District of New York, made on the 28th day of February, 1917, wherein that Honorable Court found that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service" "as used in Section 1 of the Act to Regulate Commerce, as amended June 18, 1910 (U. S. Comp. Stat., Sec. 8563, sub. div. 3), authorizes the making of contracts or the continued performance of the contract heretofore made, between the complainant-appellee Railroad Company and the defendant-appellant Telegraph Company, dated October 15, 1884, by the terms of which said companies agree to exchange services upon bases other than the basis of the lawful rates of said Railroad Company, as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said Telegraph Company regularly charged other customers for similar services.

"V. The Court erred in making and entering a decree affirming the decree of the court below.

"VI. The Court erred in not reversing the decree of the court below.

"Wherefore the appellant prays that said decree

may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified."

Argument.

In connection with the foregoing statement, it is proper that the Telegraph Company should advise the Court that all times, both prior to and subsequent to the enactment of the Amendment of June 18, 1910, bringing telegraph companies subject to the control of the Interstate Commerce Commission, it has contended that all its contracts, both as respects "on line" transportation and "off line" transportation were valid, and that the railway companies should be required to carry them out according to their terms. That as respects this feature of the contracts in view of the peculiar relations created by such contracts between the Telegraph Company and the Railway Companies, the relation which Section 6 of the Interstate Commerce Act sought to regulate was not the relation which existed between these companies; that is, that the Telegraph Company was not with respect to such transportation a shipper as described in the sixth section of the Interstate Commerce Act. Inasmuch, however, as the Conference Ruling of the Commission of July, 1914, and repeated on March 28, 1916, had been promulgated by the Commission, and the consequence of refusing to follow such ruling might result in prosecutions for violation of the Interstate Commerce Act, very many of the railway companies refused to carry out their contracts, it became a serious question as how to secure a construction of the Interstate Commerce Act, which would review the action of the Commission and would be accepted by the railway companies. This action was therefore insti-

tuted for that purpose, and as appears from the record, the Interstate Commerce Commission was given full opportunity upon the trial of the action before Judge Mayer to appear and be heard, and Judge Mayer, in his discretion, accompanied the privilege to the Attorney of the Interstate Commerce Commission to thus appear with the condition in his favor that in case a decision was adverse to the view expressed by the Interstate Commerce Commission, that the defendant in the action should by proper proceedings bring the proceedings to a higher court in order that final determination might be made that would be considered binding and conclusive upon all parties. The Telegraph Company is therefore here formally assigning error in the decree, but desires that the Court should understand that it believes, as it has constantly insisted, that the decree below was right, but has brought the matter into this Court, in pursuance of its understanding with the District Court, in order that the Interstate Commerce Commission may have an opportunity to be heard through its counsel in support of its ruling.

While the reasons of the Railway Company in support of its view will be presented in its brief the Telegraph Company also begs to submit the following considerations which seem to it conclusive against the ruling of the Commission:

(a) The language used in the proviso "that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services" requires more than the Interstate Commerce Commission's ruling will permit to make it effective. It provides first for "contracts" implying that the parties may fix terms for such contracts. Under the Commission's ruling only one condition could be exacted by either party of

the other; that is payment of money at regular rates, while the Act authorizes *"contracts for exchange of services."* Exchange means "barter"; that is, the fixing of values and terms by each party equally with the term "contract." Both terms imply the fixing of terms dependent upon the special situation of the particular parties contracting or exchanging. It is the "exchange of services" without limitation, except such services as each party may in the particular situation be able to render to the other that is authorized. Such "exchange" implies valuation by each of the services to be furnished rendered to or by the other.

(b) The Commission's ruling and construction of the Act limiting the Railway Company's right to render services to the Telegraph Company to a measurement in money of transportation and the Telegraph Company's right to a like measurement in money of services rendered to the Railway Company, renders meaningless the proviso because without such a proviso such right would equally appertain to the parties.

(c) Both "on line" and "off line" transportation are each equally services required by the Telegraph Company in the maintenance of its lines of communication for the public, and the attempted distinction between the two is not justified by anything that appears in the Act. With respect to each the Telegraph Company stood in identically the same relation to the Railroad Company, and with respect to each the Railway Company was intended by Congress to be empowered to do something for the Telegraph Company separate and distinct from that which it could do for an ordinary shipper under Section 6 of the Act.

(d) Under the broad power to contract for exchange of services which existed prior to this Congressional legislation, and which we claim was fully

recognized by the proviso in the first section of the Act, the parties did enter into contracts which covered a great variety of services, and were not limited to transportation on the one side, and transmission of intelligence on the other. These elements, selected by the Commission in its ruling, were only one on each side, out of many which each party rendered in the way of services to the other, and the Interstate Commerce Commission was wholly unjustified in separating these two elements from all other elements in the contract, and treating them as intended by the parties to be each the equivalent of the other without respect to all the other features of the contract.

(e) The fact that the Railway Company owned a property covering a limited territory, and along which was situated a small part of the Telegraph Company's lines of communications, did not justify the conclusion that an entirely different rule was to be applied with respect to transportation of material that would be needed by the Telegraph Company upon the wire lines upon that railway, as differentiated from material required by the Telegraph Company on lines off the line of that railroad. The Telegraph Company equally required both classes of material, and Congress gave the parties full right to contract alike for the service such transportation would afford as to both sets of lines.

This is clear when we consider that cable companies which have no wire lines along the lines of railways were equally entitled to make contract with such railways for the exchange of services as telegraph companies which had wire lines along such railways. Any transportation for such cable company would be "off line" as to its lines, while not as to the Railway Company perhaps. Again, the Telegraph Company transmitting, as it is re-

quired under these contracts, messages for the Railway Company on its lines off the line of railway in points of the United States is just as much rendering an "off line" service so far as the Railway Company is concerned, as the Railway Company is rendering an "off line" service in transporting material for the Telegraph Company for use on its line not situated on the line of the railway. With these observations, the Telegraph Company begs to submit this case, leaving the argument in support of the appeal to the representative of the Interstate Commerce Commission.

Respectfully submitted,

RUSH TAGGART,
Attorney for the Western Union
Telegraph Company.

APPENDIX.

Exhibit A.

MEMORANDUM.

Memorandum of The Western Union Telegraph Company regarding its right to have material and supplies for so-called "up-town" offices transported under contract with the Chicago, Indianapolis & Louisville Railway Company.

* * * * *

The question here presented for a Conference Ruling of the Commission is an important one and involves the interpretation of the scope and effect of the amendment to Section 1 of the Interstate Commerce Law, approved June 18, 1910.

By that amendment section 1 was so changed as to bring within its provisions telegraph, telephone and cable companies engaged in sending messages from one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, and all the provisions of section 1 were made applicable to charges made for the transmission of messages by telegraph, telephone or cable companies, with the proviso, first, that there might be a classification of messages, and further, that "nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

The question with which we are concerned relates to the meaning of the provision just quoted.

By the terms of the submission of this matter to the Commission, the contract between the Western Union Telegraph Company and the Chicago, Indianapolis & Louisville Railway Company is admitted to expressly provide for the transportation by the railway company for the telegraph company, so far as may be legal, of all materials and supplies used in the maintenance of telegraph offices in towns or cities through which the railway passes and for telegraph lines extending from the right of way of the railway company to such offices, described in the statement as "uptown" offices. These up-town offices are clearly recognized by the contract, copy of which is attached hereto, and there is a further recognition of these offices in the 6th paragraph of the contract where it is provided that the telegraph company shall not establish any such offices where there is a telegraph office in the railway station and the railway is the only railway reaching said city. The reason for this is very evi-

dent when the contract is examined, because of the division of commercial receipts at offices established in railway stations.

The contract in its inception and fundamental provisions is one clearly contemplated by the proviso in the 1st section of the Interstate Commerce Law for the exchange of services in part and for the economical joint construction, operation and maintenance of lines of telegraph which, on one side entirely serve the interests of the railway company for its railway business, and on the other provide for public telegraphic facilities through the offices of the telegraph company.

The railway company, however, raises the question of whether under Conference Ruling No. 364 it is legally permissible for it to transport supplies for these "up-town" offices as above described. Conference Ruling No. 364 holds that a railway company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.

With this ruling we have not the slightest quarrel and believe it to be correct. The only question is whether the interpretation of the railway company is correct that in order to constitute "strictly company matters" it is necessary that the service be directly connected with an office or telegraph line jointly occupied or operated by the railway company and the telegraph company. This is practically the interpretation of the railway company and the result of its construction of Rule 364. The telegraph company's view of "company matters" is that the affairs of either company within the limits of a contract for an exchange of services is within the ruling of the commission.

Similar questions have arisen in different forms with other railway companies, but all these ques-

tions ultimately turn upon the proper construction of the proviso to section 1 of the Interstate Commerce Law above quoted, and it is with the meaning of that proviso, that this memorandum is concerned, not only with reference to the precise question involved here, but as a question of general import to the telegraph company and the railway companies with which it contracts.

The Commission in Conference Ruling No. 219 refers to its decision issued December 27, 1906, (which was prior to the amendment in question) in which it limited the right of a railway company to transport employees and material for telegraph companies for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation and maintenance of a telegraph line and service on its own line of railway.

This was the ruling of the Commission prior to the amendment to Section 1 of the Interstate Commerce Law, and in effect at the time of the amendment. Notwithstanding the amendment to the Interstate Commerce Act of June 18th, 1910, bringing under the operation of the act the telegraph, telephone and cable companies, and notwithstanding the fact that Congress in making such amendment, provided in broad and unequivocal language that the telegraph company and railway companies should be at liberty to enter into contracts for the exchange of service, some of the railway companies' counsel, in interpreting the contract and the amendment, practically interpret the proviso of the amendment as limiting the railway companies to such contracts only as would have been legitimate under the Commission's ruling of December 27, 1906. It is because of such narrow and restricted

construction of the amendment that the telegraph company considers the submission to the Commission of this matter of particular importance.

It is significant that the language used in the proviso contains no limitation upon the right of telegraph and railway companies to contract with respect to exchange of services. This is significant in view of the fact that such limitations had been placed upon the right of the telegraph and railway companies to contract by the ruling of the Commission above referred to, and Congress must be held thus to have legislated with such ruling in mind, and by use of the language granting the companies the unrestricted right to contract for the exchange of services, clearly to have intended to enable the companies to contract without the restricions or limitations imposed by the former ruling of the Commission. The intent of Congress clearly was to enable the telegraph company to transmit messages for the railway company and the railway company to transport employees and material for the telegraph company under such terms and conditions and to such an extent as they might agree upon, whether such materials were to be used upon the line of the railway of the contracting railway company or upon other lines of telegraph over which the railway, under the terms of the contract, would have the right to have messages transmitted as a part of the consideration for such transportation by the railway company.

The other provisions of Section 1 of the Act to regulate Commerce as amended June 18, 1910, respecting the exchange of passes and franks between the telegraph company and the railway company and other common carriers further show the intent of Congress to bring the telegraph company and other common carriers upon an equal footing, and

although perhaps not controlling, are persuasive in support of the contention of the telegraph company.

As an illustration of some of the forms the restricted construction of this proviso has assumed it has been contended by some railway companies that not only is this proviso limited as indicated by the view of the railway company in this particular case, but that it is also incumbent upon both the telegraph and the railway company, in making a contract for the "exchange of services," to specify the exact amount of such service to be rendered by each for the other, *i. e.*, the telegraph company must specify the value in dollars calculated at its regular rates to which it will transmit messages for the railway company, and the railway company, on its part, under a contract of this character for the transportation of material, whether for use on the line of railway of the company contracting or off the line, must designate the value of such transportation calculated at its regular tariff rates, and this in a contract providing for the joint construction, operation and maintenance of telegraph lines for the use of both parties, in which there are many valuable considerations furnished by both parties in addition to the transmission of messages and the transportation of men and materials by the respective parties.

If the contention of the railroad company that it cannot lawfully transport material for "up-town" offices is a proper one, it is important for the Commission to define the extent to which the obligations of both parties under the contract are limited with respect to the transmission of messages on the one hand, and the transportation of materials on the other.

The contention of the telegraph company, however, is that the effect of this proviso to section 1

of the act is absolutely to free the hands of the railroad company and the telegraph company from the limitations on their right to contract for exchange of services under the ruling of the Commission of December 27, 1906, leaving it to the discretion of the contracting parties as to the character and extent of the services which each shall render to the other; that when they thus contract—the one to furnish facilities for the transmission of messages over its entire telegraph system, and the other for the transportation of men and material, the transmission of the telegraph messages is clearly to be considered as an equivalent for the transportation of employees and material, taken in connection with the other considerations named in the contract, and that the two parties are "exchanging services" with respect to "strictly company matters" although the materials and supplies which the railroad company transports may be for use in purely commercial offices of the telegraph company along or beyond the lines of the railway company, and although the employees are transported in connection with the general commercial business of the telegraph company and not directly related to the telegraph business upon the railway transporting them.

As stated above the question here presented is not peculiar to the Chicago, Indianapolis & Louisville Railway Company, but relates to various contracts with railway companies throughout the country, and the importance of an accurate interpretation of the scope and effect of the proviso to Section 1 need scarcely be emphasized.

The Western Union Telegraph Company therefore respectfully asks that the Commission, in its ruling as to the scope and effect of this language in Section 1, give effect to the evident intent of Congress to secure to the telegraph company and the

railway company the full power to contract free from the limitations in existence at the time the amendment was passed.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY,

By RUSH TAGGART,
General Counsel.

NEW YORK, JUNE 4, 1913.

June 5, 1913.

Mr. H. R. KURRIE,
General Attorney,
Chicago, Indianapolis & Louisville Ry. Co.,
Chicago, Illinois.

Dear Sir: I beg to acknowledge the receipt of your letter of May 27 concerning the propriety of a railroad carrying free materials used in the construction and maintenance of telegraph lines which run between uptown offices of the telegraph company and the lines of that company on the railroad right of way, also the right to carry free the supplies used in such uptown offices. As the law stood prior to 1910 the Commission ruled in answer to a similar inquiry from the president of the Western Union Telegraph Company that a contract of similar purport was unlawful. At that time the Commission considered that the law confined the right of free or reduced rate transportation of men and supplies for telegraph companies to such men and supplies as were necessary for the construction, maintenance and operation of lines and offices used by the railway company, and held that such free or reduced rate transportation cannot be lawfully given to telegraph companies for men not so em-

ployed or supplies not so used. In the proceeding entitled *In the Matter of Railroad-Telegraph Contracts,* 12 I. C. C. 10, we said that we could not see that full performance of such contracts would affect any public or private law or interest adversely, but we found no law authorizing it. Subsequent to the amendment of the act of 1910 we issued Conference Ruling No. 364, as follows.

> EXCHANGE OF SERVICE BY TELEGRAPH AND RAILROAD COMPANIES.
>
> Under the amendatory act of June 18, 1910, it is provided, "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry, *Held,* That a railroad company and a telegraph company may exchange services *with respect to strictly company matters* on the basis of their agreement.

This conference ruling was made when the Commission had before it a contract between a railroad company and a telegraph company which contained similar provisions to those which you recite. It is my personal view that the supplies and material for use in offices and on lines that are located off the right of way of the carrier fall within the description "strictly company matters." I view the question, however, as of such importance as to require that it be considered by the Commission as a whole, and I will therefore present it to my colleagues in conference during the coming week and will advise you of the conclusion which they reach.

Very truly yours,

JAMES S. HARLAN,

Commissioner.

June 9, 1913.

Mr. H. R. KURRIE,
General Attorney,
Chicago, Indianapolis & Louisville Ry. Co.,
Chicago, Illinois.

Dear Sir: I brought before my colleagues in conference today the subject matter of your communication of May 27, with respect to a contract between your company and the Western Union Telegraph Company. And I am directed by the Commission to advise you that your company may lawfully transport free of charge materials used in the construction and maintenance of telegraph lines running from the lines on your right of way to so-called "uptown offices," and may also carry free the supplies used in those offices. The Commission holds that such transportation comes within Conference Ruling No. 364, which provides that a railroad company and a telegraph company may exchange services "with respect to strictly company matters" on the basis of their agreement.

I am sending a copy of this letter, also copy of my letter to you of June 5, to Mr. Rush Taggart, General Counsel of the Western Union Telegraph Company.

Very truly yours,

JAMES S. HARLAN,
Commissioner.

Exhibit B.

To The Interstate Commerce Commission,
Washington, D. C.

The Western Union Telegraph Company and the Central Vermont Railroad Company, under date of September 8, 1885, entered into a contract providing generally for the occupation of the railroad right of way, bridges and stations by a telegraph line, and for the joint operation of a telegraph business. A copy of the contract, which is still in force, is attached hereto.

In the seventh section of the contract, it is provided:

> "The Telegraph Company agrees to issue to such officers and agents of the Railroad Company as may be designated by the President or General Manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the Railroad Company, originating at or destined to points on the Telegraph Company's lines in the United States, beyond or off the lines of said railroads, to an amount not exceeding fifteen thousand dollars ($15,000.00) per annum for the first five hundred (500) miles of railroad constructed, owned, leased, or controlled and operated by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased or controlled and operated and occupied as aforesaid."

The ninth section provides that:

"The Railroad Company agrees to transport free of charge over its railroads, upon application of the Superintendent or other officer of the Telegraph Company, all persons in the employ of the Telegraph Company, when traveling on the business of said Company; and also to transport and distribute free of charge along the line of its railroads covered by this agreement, all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by this agreement, and of such additional wires or lines of poles and wires as may be erected under the provisions of this agreement. Also all material and supplies for the establishment, maintenance and operation of the offices along said railroads.

And the Railroad Company further agrees to transport without charge the poles and other material of the Telegraph Company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said Railroad Company, not exceeding one-third (1-3) of the amount of free telegraphic service which the Telegraph Company herein agrees to perform for the Railroad Company beyond the line of its railroads, and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles and other materials in excess of said amount. Settlement to be made yearly."

A question having arisen as to the right of the Railroad Company under the Interstate Commerce law as amended in 1910, to transport for the telegraph company materials and supplies for use of the lines of the railroads covered by the contract, in accordance with Section nine thereof, Mr. Rush Taggart, General Counsel of the Telegraph Company, on June 17th, wrote the following letter to Mr. C. W. Witters, Vice President and Attorney for the Central Vermont Railway Company:

"At the request of the Comptroller of this company, and upon the suggestion of the General Freight Agent of your company, I am writing you relative to the attitude of your company with respect to carrying material and supplies over its lines for use by the telegraph company on other lines.

I understand the position of your company to be that under the Interstate Commerce Act as amended in 1910, it is illegal for the railway company to carry such material and supplies in accordance with the provisions of the contract, and in support of this position, your General Freight Agent, in his letter of March 28, 1913, cites Conference Ruling of the Commission No. 219, issued in 1907 prior to the amendment to the Act bringing telegraph companies under the jurisdiction of the Act.

In section 1 of the act as amended, it is provided that, 'Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.'

Congress in making the amendment of course had before it the ruling of the Commission cited by your General Freight Agent, and the intention clearly was to allow the telegraph company and railway company to make such contracts for this

'exchange of services' as might in the discretion of their officers, seem proper.

Again, in Ruling 364, the Commission reiterates the rule that a railroad company and a telegraph company may exchange services with respect to strictly company matters, and although the question has been taken as settled by the railroads generally throughout the country, it was taken up recently by the Chicago, Indianapolis & Louisville Railway Company, and on June 9, 1913, the Commission, through Commissioner Harlan, laid at rest whatsoever doubt may have been raised by the use of the words 'strictly company matters' in Ruling 364. Commissioner Harlan in his letter to Mr. H. R. Kurrie, General Attorney for the Chicago, Indianapolis & Louisville Railway Company, says: 'I am directed by the Commission to advise you that your company may lawfully transport free of charge materials used in the construction and maintenance of telegraph lines running from the lines on your right of way to so-called "uptown" offices, and may also carry free the supplies used in those offices. The Commission holds that such transportation comes within conference Ruling 364, which provides that a railroad company and a telegraph company may exchange services "with respect to strictly company matters" on the basis of their agreement.'

The principle involved in the question raised by your company is, of course, identical with that involved in this recent ruling.

I confess that I have heretofore been unable to distinguish between the positions of the telegraph company and the railroad company under contracts similar to the one existing between your company and the telegraph company, and if the telegraph company can legally place at the disposal of the

railroad company its telegraphic facilities throughout the country, it is difficult to understand why the railroad company cannot legally transport materials for the maintenance and operation of the lines so constructed and operated.

However, as stated above, any question respecting the matter would seem to be put at rest by the recent ruling above quoted, and I trust that your company may see its way clear to adopt the rule now generally in force throughout the country."

To this letter the Attorney for the Railway Company replied as follows:

"This Company would like to extend to your Company every facility it lawfully can in the handling and carrying its material and supplies over its lines to be used by the Telegraph Company on other lines. But I am unable to see that the amendment of 1910 of the Interstate Commerce Act in any way changes the decision of the Commission of May 11, 1909, Vol. 16-246. But on the contrary, in my judgment, the amendment was made as an endorsement or confirmation of the above decision. I think the letter of Commissioner Harlan to which you refer in your letter to me of June 17th is clearly in line with the above decision.

The lines running from the railroad right of way to the 'up-town offices' are clearly in the interest of the road from which they lead, and not in the interest of or to be used by another road. Ruling 364 confirms rather than shakes the opinion I have all along maintained.

I regret as much as this Company does that the old practices and the former construction of the contract between your and this Company cannot now with safety be lived up to."

On September 10, 1913, Mr. Taggart, on behalf of the Western Union, again wrote Mr. Witters, Attorney for the Railway Company, as follows:

"I regret that you are unable to concur in the conclusions reached in my letter of June 17th, and feel that you give undue importance to the decision of the Interstate Commerce Commission of May 11, 1909, 16 I. C. C. Rep. 16, 246, and I find myself wholly unable to agree with your conclusion that the amendment to the act was made as an endorsement or confirmation of that decision. A clear statement of the situation will, I believe, wholly eliminate this conception of the attitude of either the Commission or Congress.

After the passage of the amendment of June 29, 1906, forbidding, in section 6, the transportation by railway companies for any greater, less or different compensation, the question as to the validity and enforcibility of the contracts between telegraph and railroad companies was for the first time brought up for consideration. At that time there was no question whatever concerning the right of the telegraph company, for it was not in any respect subject to the provisions of the act to regulate commerce. The question was solely with respect to how far the railway companies should carry out the provisions of their contracts providing for the transportation of poles and other materials of the telegraph company to be used by it beyond or off the lines of said railroad. Accordingly the matter was presented to the Commission and it issued its ruling on December 22, 1906, now forming Conference Ruling 219. The basis of this ruling, as I understand it, is that the telegraph company, in so far as materials and supplies for the operation of telegraph lines along the railroad or system of railroads, is simply doing for the railroad company what the railroad company is permitted to do for itself, namely, furnishing and operating a telegraph line; that this is, in effect, a

railroad function necessary for the operation of the railway, and in so far as materials and supplies are thus limited, it is simply a method which the railway company has adopted of securing in the most economical way a necessary facility, and therefore the ruling of the Commission was that, to that extent, these contracts were enforcible and properly to be carried out by the railway companies.

The decision of the Commission of May 11, 1909, to which you refer, proceeds upon precisely the same principles and supports the right of the railway company to contract with express companies to carry its men and supplies to the same extent to which the Commission had held it was permitted to contract with the telegraph company, for the reason that the express company carries that which the railway company could be required to carry along and upon its own line in the absence of a contract with the express company.

When the amendment of 1910 was made, however, for the first time bringing the telegraph company under the operation of the act, section 1, after clearly defining that the provisions of that section applied to and covered the transmission of messages by the telegraph company between different states and to and from foreign countries, contains the express provision that 'nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.' Observe, please, that there is no limitation here upon the manner in which the companies may contract; there is no limitation that the railway company shall transport for the telegraph company only materials and supplies for use on its own lines. Indeed no such reservation of the right under the rul-

ings of the Commission was necessary because without anything in the act itself referring to such contracts the Commission had ruled that the railway company had such a right, so that this provision was not necessary to cover that feature of the situation. Nor was it necessary for the telegraph company, under the principle of the ruling of the Commission to which attention has been called, to have any such proviso because on the same principle under which the railroad company would be permitted to provide these facilities for the telegraph company, the telegraph company would have the right to make such contract with the railway company to enable it to secure the most economical and practical facilities for the transaction of the business for which it was organized, *i. e.*, the transmission of intelligence by wire throughout the United States.

It was, therefore, it seems to me, the clear intent of Congress, as indicated by the plain meaning of the language used, that while the telegraph company was thus brought under the provisions of the act, nothing in the act was to be construed as limiting the telegraph company on the one hand, to contract for the transmission of messages for other carriers, nor, on the part of the railway companies, to limit them in making contracts with telegraph companies for furnishing to the telegraph companies transportation of men and property, the only limitation being that there should be an exchange of services as expressed in the act—the transportation on one hand and the transmission of messages on the other, the extent of the same to be furnished by either of the parties to be left to the discretion of their officers.

The subsequent rulings of the Commission have all been in that direction. Ruling 364 limits the

exchange of services to matters which are strictly company matters, *i. e.*, the railway company is limited in exchanging services with the telegraph company to the extent that transportation can be furnished the telegraph company only with respect to matters which are 'company matters' of the telegraph company, and, on the other hand, the telegraph company is limited to making these arrangements for the transmission of messages concerning 'company matters' of the railway company.

The conclusion that it was not the intent of Congress to limit the transportation of material and supplies to those for use on the particular line of railroad would seem to be irresistible when we consider the language of the provision that nothing in the act shall be construed to prevent 'telephone, telegraph and *cable* companies from entering into contracts,' etc., as cable companies in the very nature of the case, are not located upon or along the right of way of railway companies with which they contract. The railway companies contracting with a cable company would, therefore, of necessity, carry material and supplies of the cable company although none of the cable company's lines are situated upon or along the railroad right of way.

The extent of the matter with which Commissioner Harlan deals in his letter is of course limited to up-town offices. With respect to these up-town offices, it may be said that they are no more in the interest of the railway company from whose right of way the wires may radiate than they are in the interest of any other railroad company, because they are entirely separate and distinct, and for the most part the wires connecting these offices do not connect with railroad offices at all, but are purely commercial wires of the telegraph company for its commercial business exclusively and in no way

whatever contributing to the service on the railroad or that portion of the railroad. They are as separate and distinct in that respect as the wires on another road, the sole interest of the particular railroad in such up-town offices being their privilege of sending over the wires connecting such offices, under franks issued by the telegraph company, messages relating to the business of the railroad, in accordance with the other provisions of the contract, but this same privilege is also extended to any other railroad.

I therefore beg to submit these considerations and believe that upon reconsideration of the question you will see that a proper construction of the contract will not only permit your company legally to perform this transportation service, but that due regard to its contract obligations with the telegraph company requires that it should do so."

In reply to the above letter, which also contained a postscript suggesting the submission of the matter for the decision of the Interstate Commerce Commission in case the railway company could not concur in the conclusions thereof, Mr. Witters, Attorney for the Railway Company, under date of September 12, wrote Mr. Taggart, Attorney for the Telegraph Company, as follows:

"There is sound reason and much force in what you say; but still I cannot believe that under the rulings of the Commissions and the opinions rendered by our courts that this company can lawfully transport property of the Telegraph Company free, or under agreement, to be used upon another line than its own.

Nothing would please me or this Company more than for the Commission to adopt your views rather than mine. I will gladly agree upon a statement for submission to the Commission."

It is therefore the desire of the Railway Company and the Telegraph Company that your Honorable Commission will make a ruling whether under the contract in question the Railway Company can, under the provisions of the Interstate Commerce Law, legally transport poles and material for the Telegraph Company for use by the Telegraph Company beyond or off the lines of the Railway Company.

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART,
General Counsel.

CENTRAL VERMONT RAILWAY COMPANY,
By C. W. WITTERS,
Vice-President and Attorney.

Dated September 25, 1913.

Exhibit C.

November 22, 1913.

MR. RUSH TAGGART,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York City.

Dear Sir: Further replying to yours of September 30, 1913, in which you submit to this Commission a question which has arisen between you and the Central Vermont Railway Co. That question, as I understand the papers submitted, is this:

May a railroad company under contract with a telegraph company for an exchange of services transport over its lines, without applying its tariff rates, the materials and supplies of the telegraph company which are not to be used by it along the right of way of the railroad company.

This Commission originally held that a railroad company might contract with a telegraph company for the free handling of its materials and supplies which were to be used along the right of way of the railroad company in the maintenance of the line of the telegraph company, but that it must apply its tariff rates to the transportation of such articles when passing over the line of the railroad company for use at points off its own right of way. In consequence of this the telegraph companies applied to Congress and secured an amendment of the act. Under the act as so amended, and as it now stands, we have been forced to hold that under a contract of this kind the railroad company may handle, without reference to its tariff rates, the property of the telegraph company, both when for use upon the line of that railroad company and also when passing over its line for use elsewhere.

Truly Yours,
C. A. PROUTY,
Commissioner.

Exhibit D.

INTERSTATE COMMERCE COMMISSION.

WASHINGTON, April 6, 1914. K.

Mr. RUSH TAGGART,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York, N. Y.
Mr. C. W. WITTERS,
Vice President, Central Vermont Railway,
St. Albans, Vt.

Gentlemen:

Under date of September 13, 1913, Mr. Taggart sent to the Commission an agreed statement of

facts in a controversy between your respective companies, relative to the right of the railway company under the provisions of a contract entered into between it and the telegraph company to transport materials and supplies for use by the telegraph company beyond or off the lines of the railway company.

Under date of November 22, 1913, Commissioner Prouty wrote Mr. Taggart, stating that the Commission held that under a contract of this kind the railroad company may handle, without reference to its tariff rates, the property of the telegraph company, both when for use upon the line of that railroad company and also when passing over its line for use elsewhere.

That question is now again presented to the Commission, and I am directed by the Commission to say, that pending further inquiry by the Commission the above expression of Commissioner Prouty on behalf of the Commission is withdrawn. The Commission directs me to request you to submit for its consideration briefs presenting your respective views on the subject and your reasons in support thereof.

I trust that it will be convenient and agreeable to you to get these briefs to us promptly, and I make free to suggest that you send at least seven copies of each brief to the end that each Commissioner may have full opportunity to read and study same at his convenience.

Yours truly,

E. E. CLARK,
Commissioner.

Exhibit E.

INTERSTATE COMMERCE COMMISSION.

In the matter of the enforcement of the contract between the Western Union Telegraph Company and the Central Vermont Railroad Company.

Brief of the Western Union Telegraph Company, filed in obedience to request of the Interstate Commerce Commission contained in its letter of April 6, 1914, addressed to the General Counsel of the Telegraph Company and to the Vice-President of the Railroad Company.

The telegraph company begs herein to submit to the Commission its views respecting the question in controversy between the telegraph company and the railroad company, which was heretofore dealt with by Commissioner Prouty in his letter, dated November 22d, 1913, addressed to Mr. Rush Taggart, General Counsel of the telegraph company.

For the information of the Commission the telegraph company attaches hereto as Appendix No. 1 the statement of facts and memorandum accompanying the same, which was before Mr. Commissioner Prouty and which formed the basis for his letter of November 22d above mentioned.

Prior to the submission of the controversy with the Vermont Central Railroad, a somewhat similar question had arisen with the Chicago, Indianapolis & Louisville Railroad Company, which was likewise informally submitted to the Commission under date of June 4, 1913, and which was considered by

Hon. James S. Harlan, Commissioner, in his letter of June 5, 1913, addressed to Mr. H. R. Kurrie, General Attorney for that railroad company. The statement of facts and the letter of Mr. Commissioner Harlan are attached hereto as Appendix No. 2.

Analysis of the contract between the Western Union Telegraph Company and the Central Vermont Railroad Company.

This contract recites, first, the ownership of certain railroads by te railroad company; second, the ownership by the telegraph company of certain telegraph lines along such railroads; third, the expiration of some pre-existing contracts and the necessity for a new contract in the interests of both parties.

After mutual releases contained in the first article of the contract, the second article provides that the telegraph company undertakes to furnish all materials for the new lines of telegraph which may be necessary, and for the maintenance, operation, repair and reconstruction of existing lines; also instruments, batteries, etc., for the operation of the offices along the railroads including the use of main batteries. In the third article the railroad company agrees to furnish all the unskilled labor necessary for the construction, maintenance, repair and reconstruction of the telegraph lines for which the telegraph company is obligated to furnish the material under the first article. The telegraph company furnishes the skilled labor, including a skilled foreman to direct the labor furnished by the railroad company. The fourth article deals with the

extent of the railroad company's right of use in the telegraph company's lines and the method by which the railroad company may procure additional facilities under certain conditions. The sixth article secures to the railroad company the free use of any telegraphic patents owned by the telegraph company. By the first paragraph of the seventh article the right of transmission between all stations on the lines of railroad for all messages relating to the railroad business of the railroad company is secured to the railroad company. The second paragraph reads as follows:

> "The Telegraph Company agrees to issue to such officers and agents of the Railroad Company as may be designated by the President or General Manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the railroad company, originating at and destined to points on the Telegraph Company's lines in the United States, beyond or off the line of said railroads, to an amount not exceeding fifteen thousand dollars ($15,000) per annum for the first five hundred (500) miles of railroad constructed, owned, leased or controlled and operated by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased or controlled and operated and occupied as aforesaid.
>
> The tolls on all of such messages to or from points beyond or off the line of said railroads shall be calculated at the regular commercial day rates fixed by the Telegraph

Company, between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one-half of the aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly. Messages sent by the Railroad Company on its railroad business over wires operated by it, destined to or received from points off the line of its railroads and in the territory of another Telegraph Company working in connection with the Western Union Telegraph Company, shall be treated as local between points on the line of the railroads covered by this agreement.

By the eighth article it is provided that either party may establish telegraph stations at such points on said railroads as it might deem necessary, and that at all such stations which the railroad company establishes for its business the telegraph company shall supply instruments, local batteries and blank form and stationery for commercial business, and the railroad operator is to transmit and deliver exclusively for the telegraph company such commercial or public messages as may be offered, at the tariff rates of the telegraph company, and render an account to the telegraph company of the telegraph business thus sent.

By the ninth article the railroad company agrees to transport free of charge all persons in the employ of the telegraph company traveling on the business of the company; also to transport and distribute free of charge along the line of its railroads all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by the agreement, *i.e.*, the lines and wires along the lines of the railroads

as they may exist from time to time during the term of the contract, and also all materials and supplies for the maintenance and operation of offices along the railroads.

Then follows the provision of the contract under which the controversy here considered arose:

> "And the Railroad Company further agrees to transport without charge the poles and other material of the Telegraph Company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said Railroad Company, not exceeding one-third (1-3) of the amount of free telegraphic service which the Telegraph Company herein agrees to perform for the Railroad Company beyond the line of its railroads, and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles and other materials in excess of said amount. Settlement to be made yearly."

In the tenth article there is a provision for the telegraph company, under certain conditions opening an independent office in the stations of the railroad company if it so elects.

The eleventh article deals with the grant by the railroad company of a right of way to the telegraph company along the railroads.

The twelfth article deals with the conditions under which each company will exonerate the other with respect to losses arising from negligence of the servants of each company.

The thirteenth article provides for the appointment of a superintendent who shall be the joint agent of the two companies, and the method of providing for his compensation.

The fourteenth article is a general provision that all the telegraph lines and wires covered by the agreement shall form a part of the general system of the telegraph company and subject, in the commercial department thereof, to the rules and regulations fixed by the telegraph company.

These are the substantial provisions of the contract determining the considerations given by each party and the contributions of each to the construction, maintenance, operation, repair and reconstruction of the lines in existence at the time the contract was made, and of new lines which may be constructed after the making of the contract.

Inasmuch as the controversy is based upon the provisions of the contract which are, to a certain extent, typical of the great majority of contracts between the telegraph company and railroad companies throughout the country (all of which are on file with the Commission) it is proper to call attention to some features in which some of the contracts differ in details, although similar in principle.

The vast majority of contracts deal with the question of the contributions of the companies respectively to the line substantially as this contract does, the telegraph company usually furnishing the materials and the railroad companies the labor. The uses of the lines thus constructed by the contracting parties respectively are usually in substance practically the same as in this contract. The right of the telegraph company to have its messages transmitted by railroad operators at telegraph stations opened by the railroad company for the operation of its railroad is substantially uniform. There are slight differences respecting the proceeds of this commercial business, some contracts giving all of the proceeds to the telegraph company and other giving a certain portion to the railroad company, the division being governed by other considerations in the contract.

The provisions of this contract respecting the transmission of messages by the telegraph company for the railroad company to a specified amount obtain in nearly all of the contracts. In some contracts, unlike this one, there is a provision that such messages may be transmitted over Western Union wires between points on the line of the railroads, while this contract limits such transmission to messages beyond or off the line of the railroad between Western Union officers and over Western Union wires under franks issued under its provisions.

So, likewise, with respect to transportation by the railroad company, this provision differs in different contracts. In some contracts the transportation is limited to material to be used upon the lines and for offices on the particular line of railroad, in others it is extended, as in this contract, to material for use beyond or off the lines of the railroad.

In all cases, however, the question is one of give and take as between the telegraph company and the railroad company in view of the peculiar conditions surrounding each particular property, the general principles and considerations underlying each contract, however, being the most economical and best way of securing for the railroad company the necessary telegraphic facilities for the operation of its railroads, and for the telegraph company the best and most economical means of securing facilities for the transmission of messages for the government of the United States and the public generally.

Development of Telegraph Facilities.

It is proper in this connection to call attention

to the historical development and analysis of such contracts between the telegraph companies and railroad companies.

While it is true that the very earliest telegraph lines were "highway lines" designed primarily for the transmission of intelligence for the government and individuals in commercial transactions, yet almost immediately thereafter in the application of the telegraph to practical use there was a connection or association with railroad companies either directly or indirectly; in some cases the relations took the form of a grant or permit to erect a telegraph line along the right of way of the railroad and the telegraph company undertook the transmission of information for the railroad company; in other cases this was done by contracts with companies whose lines were constructed on highways parelleling the railroad, but very early in the development of the railroads and the telegraph it became apparent that the speedy transmission of information was a most valuable adjunct in the operation of railroads, and it developed that before many years had elapsed contracts were being made between the telegraph companies then in existence and the railroad companies, and more and more the railroads were learning to use the telegraph as an aid in the more speedy and safe operation of their trains, and so it came to pass that very early the railroad companies were employing regular dispatchers to transmit telegraphic train orders. After that the development was very rapid, particularly during the civil war when enormous pressure was put upon the railroad companies in the use of their facilities.

The contracts made in carrying out this connection between the railroad and telegraph companies naturally varied in their terms, but as the telegraph business became more uniform and was

handled more and more by companies operating under the same general conditions, the natural result was that the contracts likewise became more uniform, until, as above stated, the contracts at the present time, while differing in many details, have the same general characteristics.

The economical and business reasons for the existence of these contracts is apparent; the telegraph company requires a speedy means of reaching all parts of its lines of repairing breaks caused by storms, and this facility is afforded by the railroad companies; the telegraph company also requires speedy methods of transporting its material and distributing it where needed. The advantages of a railroad line over a highway line are therefore manifest provided the same can be obtained upon reasonable and proper terms. The lines constructed by the telegraph company would supply a line of poles and wires capable of carrying not only all facilities necessary for the telegraph company but an ample surplus for the facilities needed by the railroad company, and it is therefore quite evident that the economical advantages of using one pole line for carrying all the wires of both companies was an expedient which would inevitably be resorted to, and as ample space is afforded upon the right of way of the railroad company it is likewise quite evident that such lines would naturally be erected on the right of way. This association of the two companies in the production of telegraphic facilities has resulted in the wide development of the telegraph for commercial uses to an extent which would have been impossible but for the use of the railroad company's right of way and stations, there being now in the Western Union System over twenty-five thousand (25,000) offices affording telegraphic facilities in the United States, over twenty-one thousand (21,000) of which do not pay

more than $25.00 per month in commercial business and has also saved large sums to the railway companies in the operation of their railways.

These general arrangements all had their origin in the early history of the railroad companies, and with such changes as have been necessitated by changing conditions, have continued until the present time. Such was the general state of affairs when in March, 1887, the act of Congress to regulate commerce was passed.

No question was made, or could be made, as to the propriety of these contracts in any of their provisions under any of the sections of the act, because they were evidently arrangements proper to be made by the railroad companies to secure needed telegraphic facilities, and the facilities furnished by the railroad companies to the telegraph companies were not in any respect discriminatory nor did they constitute an unreasonable preference with respect to the transportation of employes and property of the telegraph company.

Following the subsequent amendments to this act, and particularly the amendment to section 6, made June 29, 1906, the question arose as to the right of the railroad companies to transport employes and material for the telegraph companies. No question was at that time raised as to the right of the telegraph companies, on their part, to contract for furnishing the facilities contracted by them to the railroad companies.

The question as to the railroad companies was presented to the Commission on the 27th of December, 1906, by the petition of the Western Union Telegraph Company and the Postal Telegraph-Cable Company, and the conclusion of the Commission on that question is contained in Conference Ruling No. 219, reading as follows:

"June 3, 1907.

219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES. (a) In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employes or property for any greater or less or different compensation that that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph lines and service on its own line. It was held that a group of separately incorporated roads, recognized as a 'railroad system' may be considered as one in the making of contracts for telegraph service on that system. (See Rulings 95-a, par. 2 and 161; see also amendatory act of June 18, 1910, interpreted in Ruling 305.)

(b) This definitely differentiates between the employes of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of dead head franks, send messages on railroad business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such

> relationship with the business of the railways as to warrant treating it is a part of of the operating facilities of such railways. Practically all telegraphing so done is off the line' business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (See Ruling 305.)"

This ruling definitely differentiated between the lines of telegraph upon the lines of a railroad company and the lines of telegraph which are off the line of the railroad company, and, as we understand the ground of the ruling respecting the right of a railroad company to transport men and material, it was upon the fundamental principle that a railroad company having need for a telegraph line to operate its railroad, might supply that need by itself building a line or using any agency for the construction of such line as might most economically and efficiently enable it to secure the desired facilities, and that the arrangement with the telegraph company was therefore an entirely proper arrangement; and that the transportation of men and material, as a part of such arrangement, was simply a method by which it was supplying that need for a necessary part of its railroad, and to that extent, notwithstanding the prohibitions of section 6 of the Interstate Commerce Law, the action of the railroad company was proper as to the lines of telegraph on its own railroad.

This is in accordance with the principles underlying Case No. 1985, reported in Vol. 16 of the I. C. C. reports, page 246, entitled "In the Matter of Contracts with Express Companies for Free Transportation of Their Men and Materials over Rail-

roads," the theory of that decision being that inasmuch as it was the duty of the railroad company to furnish the public with facilities for the rapid transportation or express transportation, and might do so either directly through its own employees or by a contract with an express company, it was proper for a railroad company to contract for that performance of such service exclusively with an express company, and that as a part of such contract it might provide for the transportation of men and supplies needed to enable the express company perfectly and completely to perform its duties. Indeed, in that case the prior decision of the Commission in the matter of railroad and telegraph contracts, 12 I. C. Rep. is cited to the same effect.

This decision follows the former decision respecting the existing contracts between railroad and telegraph companies for the transportation of men and materials. Such transportation as to the line of the railroad was upheld as proper, but as to transportation beyond or off the line of the particular road—as to the railroad companies—such transportation was prohibited because of the express provisions of section 6 as amended. The contracts with respect to transmission of messages by the telegraph companies for the railroad companies beyond or off the lines of the railroads were not affected by this ruling for the reason that telegraph companies were not then in any respect subject to the provisions of the act to regulate commerce, and no prohibition applied to them except the general common law provisions concerning the transmission of messages over their lines.

Matters were in this condition when Congress, on June 18, 1910, after a protracted consideration of all the provisions of the Act, adopted the amendments now in force and under which the rights of the parties are to be decided.

The Present Act.

In the first section of the act there was an amendment making the act applicable to telegraph companies in the same manner as to other common carriers, and providing that:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; PROVIDED, That messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: AND PROVIDED FURTHER, That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

In the part of the first section relating to the issuing of free transportation, we find the following:

> "And Provided Further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their

families of other common carriers subject to the provisions of this act."

It is significant, and a fact worthy of especial note in this connection, that section 6, which had theretofore been applied only to common carriers engaged in the transportation of persons and property, was not made specifically to apply to telegraph, telephone and cable companies which were brought within the provisions of the act by the first section.

We are therefore brought to a consideration of the question as to the effect which is to be given to the amendment to section 1 of the act. The proviso last above quoted, relating to the issue and exchange of passes and franks evidently applies to strictly "free" or complimentary service to the officers, agents, employees and their families of the telegraph companies and the officers, agents, employees and their families of other common carriers, and may therefore be laid aside as having no application to the question before us, for the reason that the transportation of men and materials and the transmission of messages, while spoken of in many of the contracts as being "free" service are not, strictly speaking, "free" service, but service rendered upon valuable consideration on each side.

We must, therefore, consider the meaning, scope and effect of this language, "Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

This language is either declaratory of the pre-existing rights of common carriers and telegraph companies, or it is intended as an extension of the rights beyond those in existence when the amendment was made.

If it is declaratory simply of the pre-existing rights of the companies, it would be in effect a mere declaration of the principle upon which the Commission proceeded in announcing Conference Ruling No. 219, that the railroad companies, as hereinbefore indicated, could either directly through their own employes, or indirectly contract for the construction and operation of telegraph lines along their own railways, and as a part of such construction, maintenance and operation, arrange for the exchange of services with the telegraph company on the lines of the railroad company as a part of the consideration passing between the companies with respect to the construction, operation and maintenance of such lines.

If, however, it is contended that this is the scope and effect of this proviso contained in the amendment to Section 1, then it is suggested that there was absolutely no reason whatever for such language being inserted with such evident care in the amendment of June 18, 1910, for the ruling of the Commission in Conference, No. 219, on the application of the Western Union and Postal Companies, and the decision already cited respecting express company contracts, had definitely decided that the railroad companies had such power under the act, notwithstanding the very drastic provisions of section 6 of the amendment of 1906 as made applicable to such railroad companies, and it was not necessary to put such language into the act in order to reserve the power to the telegraph company because the mere bringing of the telegraph companies under the provisions of the Act would not of itself, differentiate the telegraph companies in that particular from the railroad companies. It therefore follows that if it be held that this language is merely declaratory of the right to exchange services between telegraph and railroad companies with respect to telegraph lines which

are co-terminous with the railroads, such language is absolutely unnecessary and superfluous.

The presumption obtains that Congress did not intend to do an unnecessary and superfluous thing in inserting this clause in the amendment of 1910, but that it was intended to confer powers to the contracting parties, which but for the proviso would not be possessed by them in view of both having been subjected to the act, and, therefore, to leave telegraph and railroad companies to contract with each other for the exchange of services with respect to lines beyond or off the line of the particular railroad.

The question is then how far and to what extent such companies may enter into contracts for the exchange of services.

The first suggestion which is urged with respect to this language is that no limits are put upon the extent to which these companies are authorized to contract with each other for the exchange of services. The railroads companies, as common carriers, have for sale the transportation of persons and property, the cost and value of which are well known to the officers and directors of those companies; the telegraph companies have facilities for the transmission of messages to all parts of the country, such facilities having a value well known to their officers and directors. The railroad companies need the facilities which the telegraph companies can furnish and the telegraph companies need the transportation and other services furnished by the railroad companies; each needs the service rendered by the other in connection with the transaction of its business, and each is well qualified to judge of the value to it of the services the other can render to it, and in this condition of affairs Congress inserted the proviso that nothing in the act shall be construed to prevent the one

from entering into contracts with the other for the exchange of services; the language is quite clear and simple and contains no limitations upon the rights thus granted. It is submitted that considerations of extraordinary weight arising from the situation of the parties or from public policy, are needed to support a decision that Congress, although using this clear and explicit language, intended that the right be hampered by unexpressed limitations.

If it be held that the railroad company is limited to the transportation of material for use on the lines of telegraph on its own right of way or a system of railroads, and the telegraph company is free to contract with reference to its entire system, then we have the peculiar situation presented that, although the railroad has an interest in the construction, maintenance and operation of the telegraph line beyond its own line of railroad for its own uses, and employs the agency of the telegraph company in supplying this need, yet by reason of section 6 of the act, the railroad company is limited to the transportation of men and material for telegraph lines for use on its own right of way, while the telegraph company is called upon to give services upon its lines of telegraph wherever situated. If, for instance, there are five railroads extending, end to end, from New York to San Francisco, each of the companies makes a contract similar to the one before the Commission. The telegraph company supplies the material, instruments, etc., for the construction of the line from New York to San Francisco, over which are to be transmitted telegraphic messages for the government, the public in general, and each of the railroads with which the telegraph company has contracted. If the principle other than that contended for by the telegraph company should be maintained, we would have the very curious anomaly of the tele-

graph company being obligated under its contracts to transmit messages from New York to San Francisco over the system of telegraph lines thus constructed for each of the railroad companies, and the respective railroads absolutely prohibited from transporting men and materials necessary to build and keep the line in repair for the purpose of sending their own messages among others.

Further, if the respective railroad companies are each prohibited from transporting men or material except for use on its own line of railroad, will not the same rule apply to the service to be rendered by the telegraph company, since it also has been brought under the provisions of the Interstate Commerce Act? If the telegraph company undertakes to transmit messages beyond or off the line of the particular railroad under the terms of its contract up to the specified amount, for no other consideration than that named in the contract, and for the amount beyond that specified to receive half rates, is it not very clearly violating sections 2 and 3 of the act by receiving less compensation from the railroad company than it charges, demands, collects and receives from other persons for doing a like or contemporaneous service? Is it not creating an undue and unreasonable preference by reason of favoring the railroad company as against all others using its lines?

The proviso in no manner suggests an intention on the part of Congress to distinguish between the limitations imposed upon the railroad company and those imposed upon the telegraph company in making these contracts for the exchange of services. It is therefore respectfully submitted that both parties are upon an exact equality with respect to the right to contract for this exchange of services—the railroad company so far as the transportation of passengers and property is concerned

and the telegraph company so far as the transmission of messages is concerned.

It may be contended that the provisions of section 6, that:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

prevents the railroad company from transporting men or material for use beyond or off the line of the railroad, and that the provisions do not apply to the telegraph company, and that there is, therefore, a distinction between the two thus made in the act itself.

It is conceded that the language of section 6, in requiring schedules to be filed and in other features, applies in terms to the transportation of passengers and property, and that the Commission has not as yet determined whether the provisions of that section apply in any respect to telegraph companies.

Of course, if the provisions of section 6 do apply to telegraph companies, then all the provisions apply, and there is no distinction between the telegraph company and the railroad company in this

respect; and if the language quoted above prevents a railroad company from transporting men and material for use off its line, it would likewise apply to a telegraph company and prevent the transmission by it of messages for the railroad company beyond or off the line of railroad. If, however, section 6 is considered as applying to the transportation of passengers and property only, then the question arises as to whether or not it creates such a distinction in the respective positions of the companies in view of the amendment to section 1, as will limit the railroad company to the transportation of men and material for use on telegraph lines on its line of railroad, and allow the telegraph company to transmit messages upon its lines, whether situated on or off the line of the railroad company.

The language quoted from section 6 evidently is limited in its application to the transportation of passengers and property upon the regularly published rates, fares and charges, which, by sections 2 and 3 are required to be uniform for all persons without any discrimination whatsoever, and the consideration for such transportation, by the provisions of section 6 of the act, must be identically the same consideration as in the case of transportation for all other persons. If this language quoted from section 6 is considered as applying to the transportation of men and material for the telegraph company, the railroad company would be prohibited from carrying men and material for use on telegraph lines on its railroad equally as much as for use beyond or off its line of railroad, because it would be transporting the men and material for a "different compensation" from that for which passengers and freight, under similar conditions, are transported for other persons.

The effect, however, of the proviso quoted from section 1 is to withdraw the transportation of men

and material for telegraph companies under contracts for exchange of services, from the same classification under which passengers and property are transported upon schedules filed under section 6, and to differentiate the compensation in all respects from the rates, fares and charges upon which the railroad company transports for other shippers.

In short, section 6 deals with the relation of the railroad company to shippers as the term is generally understood, and the proviso to section 1 deals with the relations between the telegraph and railroad companies under a contract by the parties unitedly joined together for the construction, maintenance and operation of a system of telegraph lines for the use of both parties and the public.

It seems inevitably to follow that unless the proviso in question is construed as extending to each of the companies the identical right to contract at its discretion and judgment, the limitation must apply equally to both, and each can furnish service only with respect to the distance the right of way of the railroad company is occupied by the telegraph company's lines, which are the subject matter of the contract.

However, as we have heretofore endeavored to point out, the interests of the public and the interests of the two parties very clearly require the simple interpretation of the act which we have contended for—namely that the telegraph company may determine on its part the extent of the services which it desires to exchange with the railroad company, and the railroad company, on its part, may decide upon the services it will render the telegraph company in exchange therefor, the only limitation being that announced in Conference Ruling No. 364:

> "Exchange of Services by Telegraph and road Companies:——Under the amendatory act of June 18, 1910, it is p(rovided 'That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service.' pUon inquiry, HELD, that a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement."

This ruling quite properly requires that the service to be rendered by one company to the other shall relate strictly to company matters, and, as we understand the ruling, with that limitation, the parties are left free to contract.

The foregoing argument has been based upon the application of this language of the act to telegraph companies alone in connection with contracts with railroad companies, as we are advised that contracts between telephone companies and railroad companies for the exchange of services are at this time very rare. Their number may increase with the development of the telephone business and the application of the telephone service to the requirements of railroad business. In such case, of course, substantially the same reasons would apply.

But when we consider the application of the language of the amendment to "cable companies" we have a clear indication that it was not the intention of Congress to limit this exchange of services to lines of the transmission company actually located upon the right of way of the other carrier. The provision is that nothing in the act shall be construed to prevent "telephone, telegraph and cable"

companies from entering into contracts for exchange of services.

The cables or conductors of a cable company are laid under navigable waters, and such companies have no system of lines paralleling or co-terminous with the lines of a railroad, and yet Congress, putting all three companies into the same class, has given telegraph and telephone companies the same power to contract for exchange of services as is given the cable companies

It is obviously impossible to limit the right of a railroad company to contract with a cable company for the transportation of material over the railroad unless that road is occupied by a cable line; to give such a construction to the language would entirely nullify the act. As an illustration, let us consider a cable company whose line extends from New York City or Coney Island to London. Will it for a moment be contended that under the amendment of 1910 such a cable company cannot lawfully enter into a contract with a railroad company extending, say from New York to Chicago, under the provisions of which the railroad company shall transport from Chicago to New York the cable and other material necessary for use on the cable line between New York and London, and on the other hand, the cable company binds itself to transmit certain cable messages for the railroad company in exchange thereof?

This may be an extreme illustration, but a consideration of this illustration, together with the entirely reasonable construction of the contract contended for by the telegraph company will, we think, convince the Commission that the ends of justice and even a strict construction of the amendment, require that the railroad companies be not

limited under their contracts to the transportation of material for use on the particular road.

Respectfully submitted,

RUSH TAGGART,
Attorney for Western
Union Telegraph Company.

Exhibit F.

INTERSTATE COMMERCE COMMISSION,
Office of the Secretary.

Washington, July 15, 1914.

Mr. Rush Taggart,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York, N. Y.

Dear Sir:—

For your information I am enclosing herewith a copy of a conference ruling agreed upon by the Commission to-day. In this connection I am instructed by the Commission also to advise you that the letter of Commissioner Prouty, written under date of November 22, 1913, is withdrawn.

Respectfully,

A. HOLMEAD,
Acting Secretary.

Enclosure.

Upon inquiry as to whether or not under the provision in Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and

cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said raiload for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

Exhibit G.

New York, September 17, 1914.

Hon. Edgar E. Clark, Chairman,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Under date of July 15th your Commission issued a conference ruling respecting the scope and effect of the provisions of section 1 of the Interstate Commerce Act concerning the exchange of services be-

tween telegraph and railroad companies, the ruling reading as follows:

> "Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under section 6 of the Act, HELD, That while said carriers may contract for an exchange of service, such service must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

The question of the effect of this ruling upon

the relations between the telegraph company and railroad companies has arisen in several aspects, and I desire to procure the interpretation of the Commission upon the same.

(1) Recently, in connection with a contract with an express company the question arose whether the parties could contract for the exchange of services to a fixed amount, say $60,000 per annum of transportation on the one hand and transmission of messages on the other calculated at regular rates of each party, with the provision that if the service rendered by either to the other did not equal the $60,000 the deficit or balance would be treated as settled.

(2) Whether in such a contract the parties may contract for the payment for excess over the fixed annual amount at one-half the regular rates for the transportation of property or for the transmission of messages.

(3) In many of the contracts with railroad companies it is provided, as one of the considerations, that the railroad companies shall transport, for use on the line of the railroads, materials of the telegraph company, without any limitation as to the amount of such transportation, and the telegraph company, on its part, undertakes to transmit for the railroad companies under franks issued to railroad employes messages relating to the business of the railroads up to a certain definite amount, usually calculated at a certain sum per mile of railroad covered by the contract, such amount being ascertained by applying commercial day rates to such messages, with a provision requiring the payment of half rates for any excess over the stipulated amount. The question arises under the recent conference ruling whether such a contract is permissible.

(4) Again in other cases the amount of messages transmitted by the telegraph company for a

railroad company is not limited but is determined solely by the needs of the railroad company. There are not many such contracts in existence at this time, but the question arises under the conference ruling whether such a provision is permissible.

(5) Further, the question arises whether the other considerations named in the contracts, such as the furnishing of facilities by the telegraph company to the railroad companies, the exchange of materials, and other provisions forming the real basis of the contracts, may be offset against transportation services by the railroad companies, or whether the purport of the conference ruling is that the exchange of services must be in equal amounts by each contracting party without regard to other considerations named in the contract and which in reality form the basis of such contracts.

Is it the intention of the Commission, under this conference ruling, to segregate those portions of the contracts relating on the one hand to the transportation of material for the telegraph company and on the other hand to the transmission of messages for the railroad companies, from all other operations under the contracts and all other considerations rendered by the parties in the way of services from each to the other?

I regret very much to have to trouble you with these matters, but as a very large part of the commercial operations of the telegraph company depends upon its connections with the various railroad companies which are covered by contract of this character, you will understand that it is very important that the company have before it an expression of your views with respect to how far it is intended this ruling is to be applied.

As cases are constantly arising both with respect to existing contracts and the renewal of old ones

as well as the negotiation of new ones involving these matters, I should be very glad to have your expression as to the various situations above outlined as early as convenient.

Very truly yours,

RUSH TAGGART,
General Counsel.

Exhibit H.

INTERSTATE COMMERCE COMMISSION.

Memorandum of The Western Union Telegraph Company respecting the application and effect of Conference Ruling of the Interstate Commerce Commission, dated July 15, 1914.

This ruling reads as follows:

> "Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation, under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of

> service, such service must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used alone the line of said railroad and in the construction, improvement or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

It is the understanding of the telegraph company that the foregoing ruling, in some way, grew out of the submission to the Commission of a question between the telegraph company and the Central Vermont Railroad Company as to whether the contract between the telegraph company and that railroad company could lawfully be carried out.

The question concerned the transportation by the railroad company of materials of the telegraph company for use on telegraph lines located beyond or off, but connected with the telegraph lines situated on the railroad company's railroad. A copy of the correspondence relating to the question is contained in a brief heretofore filed with the Commission, and also attached hereto and asked to be treated as a part of this memorandum.

Following the ruling the Western Union Telegraph Company, through its general counsel, called attention to some features of the ruling and their application to existing contracts between

the telegraph company and various railroad companies, and in response thereto, under date of January 5, 1915, the telegraph company was advised by Mr. Chairman Harlan that the Commission would be glad to receive and consider briefs on the question if filed on or before February 1, 1915.

In obedience to that suggestion, the telegraph company therefore begs leave to file this brief, together with the memorandum submitted with respect to the question between the telegraph company and the Central Vermont Railroad Company, and also to call attention to the provisions of the contract with that railroad company, reproduced as an appendix to this brief.

The contract of September 8th, 1885, between the Western Union Telegraph Company and the Central Vermont Railroad is fairly typical of a great number of contracts between the telegraph company and the various railroads throughout the United States, there being about three hundred contracts between the telegraph company and railroad companies operating throughout the country, many of such contracts covering a large number of railroads united in a so-called railroad system, so that in fact the contracts cover many more railroads than the number of contracts would seem to indicate.

While these contracts differ in certain features all have common points of resemblance, particularly with respect to the question now under consideration.

An examination of this particular contract shows a reference to earlier contracts between the same parties or their successors, running back to 1873; many of the railroad contracts run back to the year 1850 or 1860, this contract relation having existed between the railroad companies and the

telegraph companies from the time of the introduction of the telegraph service for public use.

It will be observed that the first part of this contract is taken up with the recital of the ownership by the railroad company of the railroads on the one part and by the telegraph company of telegraph lines on the other, and then proceeds by stating that the purpose of the contract for the exchange of services is to provide adequate telegraph facilities for the railroad company and for the purpose of maintaining all the telegraph lines referred to and the additions thereto with the greatest efficiency and economy in the interests of both parties.

This may be said to be a very adequate expression of the general purposes underlying the making and carrying out of all the contracts in existence from the time of the introduction of telegraphy down to the present time.

The second article of this contract provides that the telegraph company shall provide all poles, wire, insulators and other necessary material for the construction of a line of poles and one wire or more as it may elect, along future branches and extensions of the railroads and along railroads, thereafter constructed, owned, leased or controlled by the railroad company on which there may be no telegraph line, and in territory where the telegraph company is permitted to construct lines; and also to furnish poles, wires, insulators and other necessary material for the maintenance, operation, repair and reconstruction or renewal of its existing lines along the railroad company's railroads, branches and extension and to furnish instruments and local batteries, blank forms, stationery for commercial or public telegraph business, for the establishment, maintenance and operation of offices

along said railroads, and the use of its main batteries for the operation of the wires therein provided for.

In the third article there is a provision defining what the railroad company contributes to the construction of new lines and the reconstruction, repair and maintenance of existing lines. The railroad contributes the labor of its section men or unskilled labor, the telegraph company furnishing the skilled labor for the stringing and maintenance of wires, and also furnishing a skilled foreman.

In the fourth article provision is made for the extent of use which the railroad company shall have for its railroad business over the wires thus provided for, maintained and operated, with a provision for additional wires under certain conditions therein named. In case there is one wire it shall be used jointly so long as it is sufficient for the joint use of both parties, but in case it can no longer accommodate the business of both parties, there is a provision for an additional wire or wires and their division between the parties to the contract.

By the 6th article the railroad is secured in the right to use any patents, discoveries or inventions of the telegraph company, and the right to use telephone patents if available.

In the 7th article, provision is made (first) for the transmission of all messages relating to its railroad business between points on the line of said railroads; and (second) for the issuing of franks authorizing what is termed the "free" transmission of messages on the telegraph company's lines beyond or off the telegraph lines along the railroad company's railroads, to an amount not exceeding $15,000.00 per annum for the first 500 miles of railroad operated by the railroad company, and $6.00 per annum for each additional mile of railroad, the tolls on all such messages from points

beyond or off the lines of said railroads to be calculated at the regular commercial day rates fixed by the telegraph company between the points at which such messages originate and the points to which they are destined, and for any excess over the said $15,000 the railroad company is to pay the telegraph company one-half the aforesaid rates for such messages, settlement to be made yearly.

It is to be noted thta this "transmission of messages" is in no sense free if by that term is meant that the railroad company pays nothing for it. It is true in the limited sense that the holder of the frank pays no money for the message when filed with the telegraph company. The considerations furnished by the railroad company are the payment for these messages.

By the 8th article either party may establish telegraph stations at any point on the railroad it may deem necessary, and at all such stations as the railroad company may establish, the telegraph company agrees to supply instruments and local batteries and blank forms and stationery for commercial use. The railroad operators at such railroad telegraph stations are to receive, transmit and deliver for the telegraph company such commercial or public messages as may be offered and charge the tariff rates of the telegraph company thereon and render monthly statements and pay all such receipts to the telegraph company in such manner and at such times as it may direct, said operators to conform to all rules and regulations of the telegraph company.

By the 9th article the railroad company agrees to transport free of charge over its railroads all persons in the employ of the telegraph company when traveling on the business of paid company; and also to transport and distribute free of charge

along the line of its railroads all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by the agreement, and of such additional wires or lines of poles and wires as may be erected under its provisions. And the railroad company further agrees to transport without charge the poles and other material of the telegraph company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said railroad company, not exceeding one-third of the amount of free telegraphic service which the telegraph company agrees to perform for the railroad company beyond the line of its railroads, and the telegraph company is to pay the railroad company one-half its regular rates on all such transportation of poles and other material in excess of said amount, settlement to be made yearly. This transportation is "free" only in the sense that no payment is made in money for it. The considerations furnished by the telegraph company in the contract are the payment for it.

By the 10th article the railroad company agrees to furnish office room, light and fuel free of charge in case the telegraph company elects to establish an office at a railroad station, the telegraph company's operator at such office to do the railroad company's telegraph business if one person can attend to the business of both parties. If not, the railroad company is to furnish its own operator.

By the 11th article, in order to secure a permanent and efficient telegraph service, a right of way is granted to the telegraph company along all the lines of railroad and its branches and extensions covered by the agreement.

By the 12th article mutual indemnity is provided with respect to the operation of the lines.

By the 13th article, provision is made for the appointment of a joint superintendent, half of whose salary is to be paid by each of the parties, and who is to have charge of the operation of the telegraph lines.

By the 14th article it is agreed that the lines shall form a part of the general system of telegraph of the telegraph company, subject to its regulations and orders.

These are the essential features of the contract in question, and may be said to be fairly representative of the contracts existing between the telegraph company and practically all of the railroad companies in the country.

The relation existing, created between the two companies, is thus described by Mr. Justice McKenna, of the Supreme Court of the United States, in an opinion, rendered January 5, 1915, in the case of United States against the Erie Railroad Company, involving an indictment against the railroad company for carrying in the railway mail letters addressed to a railroad operator at a station on the railroad under a contract in its essential features similar to the one we have analyzed:

> "It will be observed that while the companies in many respects are independent, they are also in some respects at least, dependent. The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company would have to do. The railroad company has an interest in the receipts of the other company and is concerned in their amount and the maintenance and increase of the telegraph busi-

> ness. The control of the telegraph company's instrumentalities and its offices and operators is in a 'competent joint superintendent of telegraph,' in whose appointment the railroad company has a voice and whom it also may discharge. It is, however, not possible, and keep this opinion within a reaonable length, to detail the many ways in which the two companies are related, and while it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpurpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is 'current.' "

In the memorandum heretofore filed in this matter, attention has been called to several additional contracts, and attention was also called to the fact that copies of contracts between the telegraph company and the railroad companies throughout the country are on file with the Commission, thus enabling the Commission, if it desires, to confirm the statement that in their general features, they fall within the description of Mr. Justice McKenna above quoted. There is, without doubt, the interrelated dependency between the telegraph and the railroad companies in the operation of telegraph lines, as pointed out by him, which inter-relation has for many years been expressed in contracts controlling the furnishing and operation of the telegraph instrumentalities made available to the public by reason of this relation.

We wish, especially, to emphasize the fact that

such inter-relations have existed from the beginning of the telegraph, and that the two facilities, the railroad on the one hand and the telegraph on the other, have grown together and thus interdependent largely as a matter of necessity in order to extend the telegraph facilities to the public, and that without these inter-dependent relations, as expressed in the contract, the creation of such facilities to the public would have been much retarded if not altogether rendered impossible.

These facts, we respectfully submit, must be borne in mind in considering the intent of Congress expressed in the provisions of the first section of the Act to Regulate Commerce as amended June 18, 1910.

In amending the Act, which not only brought telegraph, telephone and cable companies under its provisions, but also enlarged the Act with reference to the railroad companies in some particulars, in the very first section of the Act after the amendment defining telegraph, telephone and cable companies as carriers subject to the Act and to be brought within its terms, and that all charges for the transmission of messages by telegraph, telephone and cable should be just and reasonable and every unjust and unreasonable charge for such service or any part thereof prohibited and declared to be unlawful, we find two very explicit provisions.

The first is that messages by telegraph, telephone or cable, subject to the provisions of the Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates are allowed to be charged for the different classes of messages.

The second provision is that nothing in the Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts

with common carriers for the exchange of services.

With respect to the first provision, it is to be noted that Congress has taken what is equivalent to "judicial notice" of the practices of the telegraph company with respect to the different classes of messages which had been created and existed at the time of the amendment, and Congress explicitly recognized these practices both as to the classification and as to the different rates permitted to be charged therefor.

It is only a fair inference that, with respect to the second proviso, Congress took equal notice of the vast inter-relations existing between the telegraph company and the railroad companies as expressed and shown by the contracts with practically every railroad in the country, and by the language employed indicated that it did not intend to destroy these relations which were the result of long experience and which in fact were so largely the basis for the existing system of commercial telegraph facilities furnished the public. In this connection it should be understood how completely these contractual relations enable the public to obtain and enjoy a general telegraphic service. Of the 25,000 offices of the telegraph company, over 20,000, it is safe to say, could not be maintained as independent telegraph offices, and but for such contracts would not afford telegraph facilities to the public. Certainly they would not exist as part of a comprehensive system.

The ruling of July 15, 1914, concerning which discussion has been requested, seems to proceed upon the assumption that the "exchange of services" referred to in the Act is restricted to the transmission of messages on the one hand, and the transportation of property on the other, and that that is the only thing Congress had in mind.

But we respectfully submit that the fair con-

struction of the language used by Congress requires a careful consideration of the situation of affairs existing at the time the amendment was made, the character of the telegraph property in existence and the manner in which these properties were worked. The most casual consideration of these facts indicates that what Congress had in mind was not the mere exchange of messages on the one part for transportation on the other, but an "exchange of services" upon the basis presented by the contracts existing at the time and under which the properties themselves had been created and were being operated. Any other meaning attached to this expression "exchange of services" would imply that Congress intended ruthlessly to destroy all these contractual relations.

These contracts provide for a real "exchange of services" of many and diverse kinds, as compared with the offsetting of bills for messages against bills for transportation, as limited by the ruling under question.

Under the contracts a railroad company furnishes a right of way, it furnishes transportation, it furnishes labor in various ways, it furnishes space, light and heat in its railroad stations, storage facilities in its warehouses, docks and yards for material, it furnishes the distribution in connection with the transportation of material along its roads. These are some of the contributions of a railroad company in the way of services, and constitute some of the considerations under which telegraph lines have been created and are being operated, maintained, and reconstructed as needed.

The telegraph company on its part furnishes material, poles, wires, cross arms, insulators, skilled labor in a greater or lesser degree, according to the particular contract, patent rights, instruments and other equipment, and in addition

thereto the transmission of messages in large amounts each year.

In the making of these contracts necessarily all the considerations on one side are estimated, and compared with all the considerations on the other, and these considerations are, as a whole, considered by the parties to the contract being as respectively fair equivalents, each for the other. It is therefore obviously impossible to separate the mere transmission of messages by the telegraph company on the one hand, or the transportation of telegraph material, either for use on the line of the railroad, or for use off the line of the railroad by the railroad company on the other, and to hold that Congress intended that there might be an offsetting of bills at the usual or current rates, and the exchange of checks or the payment of money for the difference, thus ignoring all other provisions of the contract under which various considerations are provided for the services performed by each for the other. If this were all that this language was meant to cover, it would seem scarcely worth the whole for Congress to insert the language in the Act. The right of way supplied by the railroad company might very well constitute if so agreed by the parties a proper consideration for the transmission of some of these various messages by the telegraph company for the railroad company; the furnishing of office space in the railroad stations might likewise be and is a large consideration for the transmission of many of the messages. On the other hand, the furnishing of poles and wires, batteries and materials to enable the railroad company to dispatch and regulate the running of its trains might also, if so stipulated by the parties, quite properly be the consideration for the transportation of much of the freight for the telegraph company by the railroad company, but

the important fact to note is that the parties have not so split up the considerations in the agreements, but all on one side, are made the equivalent of all on the other side. No separation is possible now. All stand or fall together. It is, we respectfully submit, not necessary, to detail the various services performed by one which might quite legally and properly constitute the consideration for the exchange of services as it existed under the contracts in existence at the time the amendment was passed, and it is, we think, quite clear that the limiting of this exchange of services to an offsetting of bills for transmission of messages and transportation of freight at the regular tariff or current rates, is not such an "exchange of services" as was contemplated by Congress.

If the ruling of July 15, 1914, is adhered to and applied to the Central Vermont Railroad contract, some of the material provisions of the contract are illegal. At least the ruling would require the railroad company to ignore some of the material provisions of the contract respecting the transportation of material, and therefore permit the telegraph company to take the position that in view of the failure of the railroad company to transport as provided in the contract, the telegraph company is free to treat the action of the railroad company as a repudiation of a material stipulation of the contract, and to terminate it. The same would likewise be true with respect to the services agreed to be rendered by the telegraph company. It would be compelled to charge the railroad company full rates for all excess messages instead of half rates as provided in the contract. This means that either the telegraph company and the railroad company must sit down and make up a supplemental contract or a new contract which will, in effect, meet the requirements of this ruling, or that the busi-

ness which has been created and maintained under the contract be terminated in large part. The situation thus created with respect to this contract will likewise result under the contracts with the other railroad companies, and chaos result with respect to the telegraph facilities throughout the country unless or until new arrangements can be made.

THE WESTERN UNION TELEGRAPH COMPANY,

By RUSH TAGGART,

Attorney.

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JAMES D. MA

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

BRIEF FOR APPELLEE.

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INDEX.

	PAGE
Statement	1
Argument	4
Chronology of Legislation, Judicial Decisions and Rulings of the Interstate Commerce Commission relating to the issues herein	6
Outline of Contract	14
The Legal Situation at the time of the 1910 Amendment	19
The Record Situation at the time of the 1910 Amendment	20
The Economic Situation at the time of the 1910 Amendment	29
The Reason for the 1910 Amendment	35
The Meaning of the 1910 Amendment	37
To give the Statute the interpretation contended for by the Commission would be to rob it of all meaning	52
The Complainant-appellee has no adequate remedy at law	54
Conclusion	55

CITATIONS.

COMMISSION'S RULINGS, OPINIONS AND REPORT—

	PAGE
Administrative Ruling No. 208	7
Administrative Ruling No. 219	8
Administrative Ruling No. 364	12
Conference Ruling No. 207	6
Conference Ruling of March 28, 1916	13
Opinion "In the Matter of Railroad-Telegraph Companies"	7
Report, Twenty-First Annual	9
Report, Twenty-Second Annual	10

STATUTES—

Act of February, 1902, *re* Right of Way	22
Act of March 2, 1899, *re* Right of Way	22
Civil Code of California	41
The Civil Code of Louisiana	41
Civil Code of Montana	41
Civil Code of North Dakota	41
Civil Code of South Dakota	41
Commerce Act Amendment of 1910	11
Field's New York Civil Code	41
Hepburn Act, 1906	6
Pacific Railroad Act, 1862	21
Post Roads Act, 1866	31, 36
Texas & Pacific Railway Act, 1871	22

CASES—

Aldridge *v.* Williams, 3 Howard 9	24
American Express Co. *v.* U. S., 212 U. S. 522	38
American Mercantile Exchange *v.* Blunt, 102 Me. 128	32
Bank *v.* Owen, 2 Peters 527	32
Bank of Kentucky *v.* Stone, 88 Fed. 383	54

PAGE

Beardsley *v.* Cottrell & Babcock, 43 Ia. 194 43
Buffum *v.* Merry, 4 Fed. Cases 605 41
Chapman *v.* Hughes, 134 Cal. 641, 657 ... 42
Chicago Great Western R. Co. *v.* Postal Tel. Cable Co., 249 Fed. 664 ..... 35, 53
Chicago, I. & L. Ry. Co. *v.* Southern Ind. Ry. Co., 70 N. E. 843 32
Chicago, I. & L. Ry. Co. *v.* U. S., 219 U. S. 486 ..... 34, 40
Church, etc., *v.* U. S., 143 U. S. 457 24
Coker *v.* the State, 8 Southern Rep. 875 .. 42
Cooper *v.* the State, 37 Ark. 412 42
Elwell *v.* Chamberlin, 31 N. Y. 611 44
Foley *v.* Speir, 100 N. Y. 552 33
Forkner *v.* the State, 95 Ind. 406 42
Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174 38
Goodrich, etc., *v.* I. C. C., 190 Fed. 943 .. 24
Haynes *v.* Rudd, 102 N. Y. 372 33
Interstate Commerce Commission *v.* Baird, 194 U. S. 25 38
I. C. C. *v.* Goodrich, 224 U. S. 194 24
Jenkins *v.* Mapes, 41 N. E. 137 45
Jermyn *v.* Elliott, 45 Atl. Rep. 950 45
Kahn *v.* Wilhelm, 118 Ark. 239; 177 S. W. 403 33
Laboree *v.* Klosterman, 33 Neb. 150 43
Lapina *v.* Williams, 232 U. S. 78 24
Long *v.* Fuller, 21 Wis. 121 46
Louisville & N. Co. *v.* Mottley, 219 U. S. 467 33
Lowey *v.* Granite State Provident Assn., 8 Misc. (N. Y.) 319 33
McMichael *v.* Wilkie, 18 Ont. App. R. 464 44
Meyer *v.* Rousseau, 47 Ark. 463 42
Moran *v.* James, 20 Misc. 235 44

PAGE

Mutual Life Ins. Co. *v.* Pearson, 114 Fed. 395. 54
Platt *v.* U. P. R. R., 99 U. S. 48..... 24
Red, etc., Co. *v.* Board, etc., 172 Fed. 695. 24
Red, etc., Co. *v.* Board, etc., 222 U. S. 380. 24
Schmidt *v.* West, 104 Fed. 274 54
Schwepy *v.* Stevens, 177 Fed 484..... 33
St. Paul, M. & M. Ry. Co. *v.* Western Union Tel. Co., 118 Fed. 497..... 22
Standard Oil *v.* U. S., 221 U. S. 1..... 24
State *v.* Austin, 23 Southern Rep. 34.... 43
Texas & Pacific R. R. Co. *v.* I. C. C., 162 U. S. 197..... 24, 49
Thomson *v.* Thomson, 7 Ves. Jr. 470 ... 32
Trist *v.* Child, 21 Wall. 441. 32
Town of Essex *v.* New England Tel. Co., 239 U. S. 313..... 36
Tucker *v.* Williamson, 229 Fed. 201..... 24
Union Central Life Ins. Co. *v.* Berlin, 90 Fed. 779..... 33
Union Life Ins. Co. *v.* Riggs, 123 Fed. 312. 54
United States Life Ins. Co. *v.* Cable, 98 Fed. 761..... 54
U. S. *v.* Chicago, I. & L. Ry. Co., 163 Fed. 114..... 9
U. S. *v.* Chicago & N. W. Ry. Co., 157 Fed. 616..... 24
U. S. *v.* Dietrich, 126 Fed. 671..... 32
U. S. *v.* Erie R. R. Co., 235 U. S. 513.... 25
U. S. *v.* Erie R. R. Co., 236 U. S. 259.... 51
U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961..... 47
U. S. *v.* Northern Pac. R. R. Co., 120 Fed. 546..... 22
U. S. *v.* Trans-Mo. Freight Assn., 166 U. S. 290..... 23, 24
U. S. *v.* Union Pacific, 91 U. S. 72..... 23, 24
U. S. *v.* Union Pacific, 148 U. S. 562..... 24

PAGE.

U. S. *v.* Union Pacific Ry. Co., 160 U. S. 1 22
Vail *v.* Strong, 10 Vt. 457, 465 46
Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. 545 47
Western Union Tel. Co. *v.* Pa. R. R. Co., 195 U. S. 540; 129 Fed. 849 ..... 22, 31, 36
Western Union Tel. Co. *v.* Richmond, 224 U. S. 160 36
Williams v. Talladega, 226 U. S. 406 36
Woodward *v.* Graffenried, 238 U. S. 284. 24

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918,

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree (Transcript, fol. 99) of the United States Circuit Court of Appeals, Second Circuit, affirming a decree (Transcript, fol. 62) of the United States District Court for the Southern District of New York, in a suit wherein the Railroad Company was complainant, and the Telegraph Company was defendant (242 Fed. Rep. 914, and 241 Fed. Rep. 162).

The bill (Transcript, fol. 3) seeks to require the Telegraph Company to abide by and perform a contract between it and the Railroad Company of

thirty years' standing, a copy of which is annexed to the bill, and which provides for the exchange of services between the companies under definitely specified terms (Transcript, fol. 41). The Telegraph Company had refused to perform a vital part of the contract, viz.: to transmit messages in accordance with the terms of the contract (Transcript, fol. 26), assigning as its ground for refusal certain provisions, as construed by the Interstate Commerce Commission (hereinafter for convenience referred to as the "Commission"), of "An Act to Regulate Commerce", approved February 4, 1887, and the amendments thereto (hereinafter for convenience referred to as the "Commerce Act").

The bill prays adjudication (1) that the contract is lawful and binding; (2) that the Telegraph Company be required specifically to perform the contract; and (3) that the Telegraph Company be perpetually enjoined from violating the contract.

The answer (Transcript, fol. 59) admits the allegations of the bill; alleges certain facts as to the extent of the Telegraph Company's telegraph system; alleges that the Telegraph Company, upon the making of the conference ruling of the Commission on March 28, 1916 (Transcript, fols. 25-26, and hereinafter referred to and discussed), in view of the many and severe penalties which would attach should the Commission's interpretation of the Commerce Act be sustained, felt compelled to adopt and apply such ruling although advised that it is doubtful whether such construction is correct; and says that the Telegraph Company is willing to carry out the contract, but has felt compelled to refuse to carry out the same in the particulars named in the bill by reason of the ruling by the Commission with respect to the limitation upon the right of the Railroad and the Telegraph Company to enter into contracts for exchange of services, and the Telegraph Company thereupon asks the Court to determine

the rights and obligations of the Railroad and Telegraph Company respectively under the provisions of the contract and in accordance with the provisions of the Commerce Act.

The case was heard on bill and answer and the decree granted the prayer of the bill. The Telegraph Company appealed to the U. S. Circuit Court of Appeals, Second Circuit, which Court affirmed the decree. Thereupon, the Telegraph Company having filed assignment of errors, this appeal by it to this Court was allowed.

An Act approved June 18, 1910, entitled "An Act to create a commerce court and to amend the Act entitled 'An Act to regulate commerce', approved February 4th, 1887, as heretofore amended, and for other purposes", effected a number of sweeping changes in the Commerce Act, among which was a proviso (hereinafter for convenience referred to as "the 1910 amendment") which reads:

> "*Nothing in this Act (the Commerce Act) shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.*"

The March 18, 1916, ruling of the Commission, referred to in the answer, held that while carriers might contract for an exchange of services, such services must be exchanged upon the basis of the published rates of the railroad and the reasonable charges of the telegraph company regularly charged to other customers for similar services, except that without reference to such lawful rates and charges a railroad might transport property for a telegraph company for use along the line of the railroad and in the construction, improvement or operation of the railroad.

The question involved, therefore, is whether the performance of the contract is prohibited in any particular by the Commerce Act.

Argument.

The contract provides that the Railroad shall furnish right-of-way to the Telegraph lines; labor in various ways; space, light and heat in its railroad stations; storage facilities in its warehouses, docks and yards for material; the transportation and distribution of material along its lines; pay the Telegraph Company $60,000 a year in cash and perform other services. It provides that the Telegraph Company shall furnish material, poles, wires, cross arms, insulators, skilled labor, patent rights, instruments and other equipment and transmit messages.

The Railroad contends that this contract is entire, that the covenants to be performed on one side are interdependent with those to be performed on the other, that the total of considerations passing from one party to the other were intended to be equivalent to and the counterpart of the total considerations received in return, and that the making and carrying out of such contract are affirmatively permitted by the 1910 amendment to the Commerce Act.

The March 28, 1916, ruling of the Commission distinguishes between "on line" and "off line" services, limiting the word "services" to the transportation of persons and material by the Railroad Company and the transmission of messages by the Telegraph Company. The distinction is that persons and material transported by the Railroad for the Telegraph Company for use by the latter in connection with its lines beyond the lines of the Railroad and the transmission of messages by the Telegraph Company for the Railroad Company to points beyond the lines of the Railroad Company or from points beyond such lines, are "off line" services, and that such transportation in connection with

telegraph lines along the lines of the Railroad and such transmission of messages between points on the lines of the Railroad are "on line" services.

The Railroad contends that such transportation of persons and materials and such transmission of messages are only one of many services exchanged between the companies under the contract and that the distinction by the Commission between "on line" and "off line" services is wholly arbitrary and that no such distinction is made or suggested in the statutes.

The Railroad further contends that to single out from the many services which are to be exchanged, under the contract, these two specific services of transportation of persons and property and transmission of messages, and place restrictions thereon, destroys the contract *in toto*, and that while it was possible for the Congress lawfully so to do, yet that is exactly the opposite of what the Congress intended to do and did do, and that the Congressional intention was to fortify this and all similar contracts in all their parts and to remove any possible question as to their validity.

The question, therefore, narrows down to the interpretation of the Commerce Act as amended. In order that the matter may be set forth in orderly and in what we believe to be the most helpful fashion, the historical method has been used somewhat in the following pages.

Chronology of Legislation, Judicial Decisions and Rulings of the Interstate Commerce Commission Relating to the Issues Herein.

In 1906 the so-called Hepburn Act was enacted amending Section 6 of the Commerce Act, so that said Section read in part as follows:

> "Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act, nor shall any carrier charge or demand or collect or receive a greater or less *or different* compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time;" (Italics ours.)

In September, 1906, the Commission ruled that only money might lawfully be received in payment for transportation subject to the Commerce Act, whether of passengers or property or for any service in connection therewith (Conference Ruling No. 207, Appendix 45, I. C. C. 57).

In October, 1906, the Commission ruled that the law did not prevent a carrier from giving free or

reduced rate carriage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced rate carriage were made part of the specifications upon which the contract was based and of the contract itself (Administrative Ruling No. 208).

In December, 1906, the Commission announced its ruling "In the Matter of Railroad-Telegraph Companies" as follows:

> "Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention. *So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.* Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making agreements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.
>
> The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally rec-

ognized as a 'railway system'; and that, in consideration of the construction, maintenance and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service *off the lines* of such carrier and on the lines or system of lines of any other carrier and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines." (Interstate Commerce Reports, Vol. XII, pp. 12-13.) (Italics ours.)

In June, 1907, the Commission announced its Administrative Ruling No. 219, in respect of transportation of men or property for telegraph companies, in which it referred to and amplified such previous rulings and decisions.

In November, 1907, the Commission announced an Administrative Ruling applying Ruling No. 219 to telephone service and calling upon carriers that had not already done so promptly to file with the Commission copies of all contracts for telegraph or telephone service on their lines. We understand that the existing contracts between the various railroad companies and the various telegraph companies, for the exchange of services, were filed and are now on file with the Commission.

In its Twenty-first Annual Report to the Congress, dated December 23, 1907, the Commission referred to its aforesaid rulings and stated in the language which it had previously used in its December, 1906, ruling and above quoted, that the contracts between the telegraph companies and the carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts of carriers that have come to the attention of the Commission, and that so far as the Commission could then see, the full performance of such contracts by the carriers with whom they were made would not affect any public or private interest adversely, but that nevertheless the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers (Twenty-First Annual Report, p. 25).

In July, 1908, the United States Circuit Court for the Northern District of Illinois, Eastern Division, announced its decision in *United States* v. *Chicago, I. & L. Ry. Co.* (163 Fed. 114), in which it confirmed the doctrine theretofore announced by the Commission that only money might lawfully be received in payment for transportation. The case

was subsequently affirmed by the Supreme Court (219 U. S. 486).

In its Twenty-second Annual Report to the Congress, dated December 24, 1908, the Commission again referred to its said rulings and report in respect of contracts between railroad and telegraph companies (Twenty-Second Annual Report, p. 129).

In 1908 the Western Union Telegraph Company (this appellant) filed a bill in the United States Circuit Court for the District of Maryland, wherein it sought specific performance by the Baltimore and Ohio Railroad Company (this appellee) of the written contract here in suit. The Railroad in its answer thereto admitted its breach of the contract in the particulars complained of and expressed its willingness and desire to fulfill all its obligations under the contract, but set forth that it was prohibited from so doing by the Hepburn Act under a specific ruling of the Commission interpreting the meaning and scope thereof.

That case was heard on bill and answer, was twice argued and elaborate briefs submitted and argument made by the Commission by express leave of the Court, but before the case was decided the amendatory Act of 1910 was enacted and approved and thereupon the parties to that suit, acting in the belief that the meaning and intent of such amendment were to permit the continued performance by them of their obligations under said contract, consented to the withdrawal of the suit, and said United States Circuit Court for the District of Maryland thereupon entered its decree therein in language as follows:

> "This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by Congress an 'Act to create a Commerce Court, and to

amend the Act entitled "An Act to Regulate Commerce", approved February 4, 1887, as heretofore amended, and for other purposes', and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22nd day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs" (Transcript, fol. 24).

The amendment above referred to, enacted and approved in 1910, changed Section 1 of the Commerce Act to read as follows (The additions of 1910 are printed in italics):

"Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, *and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, or to any other State, Territory, or District of the United States, or to any foreign country*, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. . . .

. . . . . .

All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable*, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be un-

lawful: *Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.*"

" . . . . . .

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly, or indirectly, issue or give any interstate free tickets, free pass or free transportation for passengers except to its employees . . . *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act:*"

In 1912 the Commission ruled as follows:

"Under the Amendatory Act of June 18, 1910, it is provided 'that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services'. Upon inquiry, *Held*, That a railroad company and a telegraph company may exchange services *with respect to strictly company matters on the basis of their agreement*" (Administrative Ruling No. 364). (Italics ours.)

On July 15, 1914, the Commission announced a Conference Ruling, which held that while carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of the railroad as published and the reasonable charges of the telegraph company regularly charged other customers for similar services, except that without reference to such rates and charges contracts may be made for transportation by the railroad for the telegraph company of the property of the latter over the line of the former, when such property is used along the line of the railroad in construction or operation of the railroad.

On March 28, 1916, the Commission promulgated a Conference ruling as follows:

> "Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or

operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

Thereupon, on April 25, 1916, the Western Union Telegraph Company notified the Baltimore and Ohio Railroad Company that because of such ruling it would continue to carry out its contract in respect of the transmission of messages under franks, but would charge for such messages at its regular rates up to the contract allowances, billing the Railroad at full rates for excesses over those allowances (Transcript, fol. 26).

Outline of the Contract.

The contract (Transcript, fol. 41), dated April 15, 1887, copy of which is annexed to the bill, provides in substance:—

That the Railroad shall retain the ownership of "exclusive railroad wires", which included instruments, switches, batteries, loops and connections, as necessary to continue in operation the existing effective telegraphic circuits between the stations and offices of the Railroad in the various places on its route, and also include one wire between Philadelphia and New York and local wires in New York then connecting the various offices and piers of the Railroad.

That the Telegraph Company should maintain at its own cost all telegraph lines covered by the contract, including such "exclusive railroad wires" and such additional wires as either Company might place thereon, the Railroad, however, to furnish the unskilled labor for such maintenance, and the wire and material, not including brackets and cross-arms, for the maintenance of the "exclusive railroad wires". That unskilled labor should not include foremen, linemen, climbers, framers or any other

laborers who require special skill in connection with special telegraph construction and maintenance, but should include all labor to dig holes and set and handle poles and other materials.

That the Telegraph Company should not furnish any tools in connection with such work, and that the Railroad might direct the location of poles, wires and cables on its right of way, the Telegraph Company furnishing the skilled labor and the Railroad the unskilled labor for changes therein.

That the Railroad should have the right to erect additional "exclusive railroad wires", paying the cost of wire, insulators and other material, not including brackets and cross-arms, with provision for sharing expense of relocation of lines.

That the Railroad should not furnish labor in connection with lines not on its right of way, and the Telegraph Company should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad in places along its route and in New York and Brooklyn, and if the Telegraph Company should have conduits available for reaching the Railroad's offices, stations and buildings, it should furnish the Railroad such connecting wires as it might be able to supply in such conduits upon payment by the Railroad of the cost of the wire and of placing same in the conduits and the *pro rata* cost of construction and maintenance.

That the Telegraph Company should furnish the use of its main batteries for the operation of all railroad wires and all instruments, local batteries, stationery and other material for commercial business, and grant the Railroad for use on the railroad wires, the free use of all telegraphic patents ever owned or used by the Telegraph Company, and that the Railroad should furnish instruments, local batteries, stationery and other material for other business.

That the railroad wires should be used only by the

Railroad for its railroad business and not for commercial or public business, except where there was but one wire it might be used jointly by the Companies, railroad messages having precedence, until such joint use might be detrimental to the Railroad, whereupon the Telegraph Company should erect an additional wire for commercial business.

That in all other cases the railroad wires might be used jointly by the Companies with the Railroad's assent when not in use for railroad business. That whenever the railroad wires should be disabled, the Railroad might use jointly with the Telegraph Company any of the commercial wires for transacting its business, such use to continue without cost until the railroad wires had been repaired, but through commercial wires should not be so used except in extreme emergency.

That either Company might maintain stations at such places on the Railroad as it desired. That at all stations of the Railroad it would furnish operators at its own expense, who should act as agents of the Telegraph Company in handling its commercial messages, charging the tariff rates thereon, and render statements and pay receipts exclusively to the Telegraph Company, such employees conforming to the orders of the Telegraph Company.

That whenever commercial business from any office amounted to $3,000 or more a year, the Telegraph Company should provide an operator for such office, who, acting as the agent of the Railroad, should attend to the Railroad's telegraph business without charge so long as one operator could attend to the business of both parties.

That the Railroad should provide free of charge in any station, office, light and fuel for the Telegraph Company, and if one person could attend to the business of both Companies therein, the operator of the Telegraph Company, acting as agent for the

Railroad, should attend to the Railroad's telegraph business without charge and conform to the rules of the Railroad applicable thereto, and if the business grew too large, the Railroad should employ its own operator.

That the Telegraph Company should transmit railroad messages free of charge between places on the Railroad's lines.

That the Telegraph Company should issue to officers of the Railroad designated by its President, annual franks for free transportation of messages relating strictly to railroad business, between points on the lines of the Telegraph Company off the lines of the Railroad to an amount not exceeding $10,000 per annum, calculated at regular day rates. That the Railroad should pay the Telegraph Company one-half of such rates on all messages in excess of that amount, settlements to be made yearly. That the free telegraphic service provided for in the contract should apply only to messages concerning the operation and business of the Railroad and not cover cables or orders for steamer or other accommodations for customers of the Railroad.

That the Railroad should transport free of charge over its lines employees of the Telegraph Company when traveling on its business along said Railroad's lines, and transport free of charge materials of the Telegraph Company for construction of its lines along the railroad, and also material for maintenance of offices of both parties at places along the railroad.

That the Railroad should transport free of charge the employees of the Telegraph Company when engaged in its work and materials for the construction and maintenance of telegraph lines other than those above referred to, whether on or off the lines of the railroad, to an amount not exceeding $10,000 per annum, calculated at current transportation rates, and the Telegraph Company should pay the

Railroad Company one-half such rates on all such transportation of employees and materials in excess of that amount, settlements to be made yearly.

That the Telegraph Company should pay the Railroad $60,000 per year in monthly installments.

That the Telegraph Company should indemnify the Railroad Company against damages arising from injury to persons in the employ or property belonging to the Telegraph Company while being carried free or at half rates on the railroad, and likewise indemnify from neglect in transmission of all messages for any person doing business with the Telegraph Company, and the Railroad should indemnify the Telegraph Company from damages for error in transmission of railroad messages.

That the provisions of the contract should apply to new extensions, exact terms of increased service per mile being specified.

That the Railroad granted to the Telegraph Company the exclusive right of way over its lands, roads and bridges for the construction and maintenance of lines for its commercial business. That the Railroad should keep such right of way clear of undergrowth or obstructions, and would not transport the employees or materials of competing companies except at current rates.

That the management of the Railroad employees engaged in telegraphic duties and employees of the Telegraph Company engaged in maintenance of the lines along the railroad, and the transportation of men and materials therefor, should be vested in a joint superintendent, who should be appointed and whose salary should be fixed by the Railroad, with the approval of the Telegraph Company, which salary should be paid equally by the two Companies. That he should be removable for cause by either party, and that the Railroad should furnish office room, light and fuel for him and each party should supply the clerical force for its own business.

The legal situation at the time of the 1910 amendment.

The law, so far as it related to the Railroad, was, *as interpreted by the Commission*, that the Commission was not vested with any authority to differentiate "off line" service by carriers for telegraph companies from the transportation of merchandise for private shippers, although the Commission announced that so far as they could see, the full performance of such contracts by the carriers would not affect any public or private interest adversely, but that the railroads might transport under such contracts free of charge "on line" freight.

That interpretation was not made because the statute said so. The reasoning on which that interpretation was based was that a railroad, in order to operate, must have a telegraph line along its right of way and if no one else built one, the railroad would have to build a line itself. The Commission, recognizing the importance of these contracts, had gone as far as it could find any argument to support it and had strained the statute, it apparently thought, to permit as much of the contracts as possible to be carried out and the Commission did not permit the fact that public commercial business, entirely extraneous to the railroad, was flashed over the lines, to interfere with this reasoning.

The Commerce Act, so far as it affected the question, provided that all charges for services rendered in the transportation of passengers and property should be just and reasonable (Section 1) and that the railroads should file schedules of all rates, fares and charges for interstate transportation and should not charge or demand or collect or receive a greater or less *or different* compensation for such transportation than such rates, fares and charges (Section 6).

Telegraph companies, however, were free to contract as they pleased, they were not under the Act.

Accordingly, at the time of the 1910 Amendment, these contracts between telegraph and railroad companies were valid as to the telegraph companies, and it was conceded by the Commission that the "on line" provisions thereof were valid as to the railroads.

We contend further that such contracts were also valid as to the railroads in relation to "off line" provisions, that is, that they were valid in all respects.

But we will not take the time of the Court to discuss this point as the 1910 Amendment has rendered it academic. It is sufficient to remind the Court that the point turned on the effect of the insertion by the Hepburn Act of the words " or different" in Section 6 of the Commerce Act.

The record situation at the time of the 1910 Amendment.

The Hepburn Act had been enacted so that the Commerce Act provided that all charges made for any service rendered in the transportation of passengers or property should be just and reasonable (Section 1); that every railroad should file with the Commission schedules showing all the rates, fares and charges for transportation between different points, and that no railroad should charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith than the rates, fares and charges so filed.

The Commission had ruled and the Circuit Court had sustained it, that nothing but money could be lawfully received in payment for transportation of

passengers or property. The Commission had also ruled that a railroad might give free carriage over its own line to contractors for materials and men for work thereon, if specified in a contract for such work.

The Commission had ruled that a railroad might transport free of charge under its contract with a telegraph company materials for use of the telegraph company in connection with its lines along the route of the railroad, that is, "on line" service.

The contracts between the telegraph and railroad companies had been filed with the Commission and the Commission had reported in two annual reports to the Congress that these contracts were *sui generis* and unlike any other contracts of carriers that had come to the attention of the Commission and that so far as the Commission could then see, the full performance of such contracts by the carriers with whom they were made would not affect any public or private interest adversely, but that nevertheless the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers.

The Congress had repeatedly recognized in legislation dating back as far as 1862, the close and necessary relation existing between railroads and telegraph companies, and the fact that telegraphic facilities are essential to the operation of railroads. This recognition may be found in various acts of the Congress incorporating railroads and granting rights of way through Indian and other reservations. Among such acts are the Pacific Railroad Act of July 1, 1862 (12 Statutes at Large, 489), and the various amendments thereto, which Act provided for the incorporation of a railroad and telegraph company

to construct a railroad and telegraph line from the Missouri River to the Pacific Ocean, and provided that such company might contract with various existing telegraph companies to move their lines on to the right of way established by the railroad company, for the purpose of operating in connection therewith; an Act incorporating the Texas & Pacific Railway Company, approved March 3, 1871 (16 Statutes at Large, 573), which authorized the constructing of a railroad and telegraph line from Marshall, Texas, via El Paso to San Diego, California; the statute approved March 2, 1899 (30 Statutes at Large, 990), providing for the granting of a right of way for a railway, telegraph and telephone line through any Indian Reservation to any railroad company which should comply with the provisions of the Act, and the Act of February 28, 1902 (32 Statutes at Large, 43), granting a right of way through the Indian Territory to Enid & Anadarko Railway Company for a railway and telegraph and telephone line.

These contracts had also been the subject of examination by the Courts. Among such cases are *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1; *St. Paul, M. & M. Ry. Co.* v. *Western Union Telegraph Co.*, 118 Fed. 497; *United States* v. *Northern Pacific R. R. Co.*, 120 Fed. 546; *Western Union Telegraph Co.* v. *Pa. R. R. Co.*, 195 U. S. 540; *Western Union Telegraph Co.* v. *Pa. R. R. Co.*, 129 Fed. 849.

It was a matter of common knowledge that railroad companies required and enjoyed instant, first hand and unlimited telegraphic service in the operation of their railroads and that the telegraph companies enjoyed the use of the rights of way of the railroad companies throughout the country for the construction and maintenance of their lines, and that in small places the only telegraphic service

afforded to the public was obtainable at the railroad stations and from the railroad employees therein.

It is well settled that the Court will recur to the "public history of the times" when an act was passed, in order to ascertain the reason as well as the meaning of the particular provisions in it. The debates in the Congress are not, however, available for such purpose.

In *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, this Court said at page 79:

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

So in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, at page 318, this Court said:

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (citations).
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasion, by a resort to the history of the times when it was passed."

So also in *United States* v. *Chicago & N. W. Ry Co.*, 157 Fed. 618, this Court at page 618 said:

> " While the court in construing the law may not inquire what individual members of Congress supposed the bill to mean, it may consult the history of the act and the reports of the committees having it in charge, . . ."

This general proposition is also borne out in various features in the following cases.

Aldridge v. *Williams*, 3 Howard, 9;
U. S. v. *Union Pacific*, 91 U. S. 72;
Platt v. *U. P. R. R.*, 99 U. S. 48;
Church, etc. v. *U. S.*, 143 U. S. 457;
U. S. v. *Union Pacific*, 148 U. S. 562;
T. & P. Ry. v. *I. C. C.*, 162 U. S. 197;
U. S. v. *Trans-Mo. Assn.*, 166 U. S. 290;
U. S. v. *C. & N. W. Ry.*, 157 Fed. 616;
Red, etc., Co. v. *Board, etc.*, 172 Fed. 695;
Standard Oil v. *U. S.*, 221 U. S. 1;
Goodrich, etc., v. *I. C. C.*, 190 Fed. 943;
Red, etc., Co. v. *Board, etc.*, 222 U. S. 380;
I. C. C. v. *Goodrich*, 224 U. S. 194;
Lapina v. *Williams*, 232 U. S. 78;
Tucker v. *Williamson*, 229 Fed. 201;
Woodward v. *Graffenried*, 238 U. S. 284.

The Congress is fairly presumed also to have had available to it the records of the Commission, which included copies of the hundreds of contracts between the many railroads in the country and some telegraph company.

In construing the Amendment of 1910, if there can be a possible doubt as to what the Congress intended, consideration must be given to the "public history of the times", which disclosed, as we have seen above, that every railroad had a contract with a telegraph company providing for the interwoven close relation necessary to the

management and joint use of telegraph lines erected on the railroads' rights of way; that such relationship had been recognized for many years by the Congress in its legislation; that such contracts had been the subject of adjudication by the highest courts of the country and in their general scope had not only escaped judicial censure, but had been specifically enforced; that no one had questioned the validity of such contracts as affecting the telegraph companies and no one had questioned the validity of such contracts as affecting the "on line" service rendered thereunder by the railroad companies, but that the Commission had considered that the "off line" provisions of such contracts, so far as they affected the railroad companies, were not authorized by law, and had reported that fact twice to the Congress, stating that in the opinion of the Commission such contracts were *sui generis* and did not affect adversely any public or private interest, but that the Commission did not feel that there was any provision of law authorizing the Commission to recognize the "off line" features thereof so far as the railroads were concerned. It will be conceded, furthermore, that no person or company had ever complained to any court or tribunal for injury or damage on account of such contracts. The nature of these contracts has been commented on by this Court in the recent case of *U. S.* v. *Erie Railroad*, 235 U. S. 513-518.

That the action of the Congress was responsive to the reports of the Commission seems clearly established by an examination of the Congressional Record with a view to determining just how soon after the filing of such reports the Congress acted. Such examination discloses that on the date of the Twenty-First Annual Report of the Commission, December 23, 1907, the Congress was adjourned and did not meet until January 6, 1908. The report was transmitted

to the House on January 6, 1908, and laid before the Senate on the next day, and in each case ordered printed, but that session of the Congress, which was the 60th Congress, adjourned on May 30, 1908. The second session of the 60th Congress convened December 7, 1908, adjourned December 19, 1908, until January 4, 1909, and adjourned *sine die* on March 4, 1909. Manifestly, there was no substantial opportunity, therefore, to consider the Twenty-First Report of the Commission.

The Twenty-Second Annual Report of the Commission, dated December 24, 1908, did not reach the Senate until January 11, 1909, when it was ordered printed, and on January 13th was taken from the Speaker's table in the House, referred and ordered printed. So there was only a month and a half within which the 60th Congress could act on the Twenty-Second Annual Report before it adjourned *sine die* on March 4, 1909.

Naturally there was no action on the report at the special session of the 61st Congress, convened March 15, 1909, and ending August 5, 1909, called by President Taft's proclamation.

The 61st Congress convened in its regular session on December 6, 1909, and adjourned December 21 to January 4, 1910, and adjourned on June 25, 1910. It was during that time that the amendment in question was enacted.

The amendment to Section 1 of the Commerce Act, not exactly in the form finally enacted, was introduced as House Bill No. 17,536 on January 10, 1910. The substance of a rival Senate Bill No. 6,737, introduced on February 25, 1910, was afterwards amalgamated with it under a Conference report.

So the whole deliberations of the 60th and 61st Congresses, intervening between the reference and order to print the Commission's reports and the in-

troduction of a bill to amend Section 1 of the Commerce Act, covered the following periods:

Twenty-First Annual Report.

60th Congress—First Session.
Senate—144 days.
House—145 days.

60th Congress—Second Session.
Senate—20 days.
House—22 days.
Maximum total—167 days.

Twenty-Second Annual Report.

60th Congress—Second Session.
Senate—52 days.
House—50 days.
61st Congress—First Session.
Senate—144 days.
House—144 days.

61st Congress—Second Session.
Senate—25 days.
House—25 days.
Maximum total—221 days.

(The Twenty-Second Annual Report is assumed to have succeeded the Twenty-First in the attention of the Congress.)

A period must have elapsed between the time when the Twenty-First Annual Report was transmitted to the respective houses of the Congress and the time when it was put in its printed form upon the desks of the members and became material from which legislation might result. Therefore, the maximum of 167 days during which the 60th Congress had before it the Twenty-First Annual Report of the Commission must be reduced to represent the true state of affairs, and a like reduction must be applied to the maxi-

mum of 221 days during which the 60th Congress and the 61st Congress were in session from the time the Twenty-Second Annual Report was put before those bodies until the Amendment of 1910 was first launched, and this period was divided not only between the two Congresses but also among four sessions.

And when this deduction of time is considered, together with Sundays and holidays, and the time incident to the organization of the 61st Congress, the maximum of days above indicated must materially exceed the actual legislative days intervening between the respective reports and the introduction of the bill which finally became the Amendment of 1910.

The Act of June 18, 1910, of which the amendment in question was a part, effected a number of sweeping changes in the Act to Regulate Commerce and was the elaborate bill creating the Commerce Court. There can be no question but that any such bill would necessarily be the product of long and careful investigation and consideration, and the salient fact is that so short a period elapsed between the Commission's reports and the introduction of the amendment in question.

In the light of this "public history of the times", and in response to the suggestions contained in the Commission's report, the Congress enacted the 1910 Amendment, by which it placed telegraph companies under the provisions of the Commerce Act, required that their rates should be just and reasonable, provided that they might classify their messages into various specified classes and such other classes as might be just and reasonable, and charge different rates for the different classes, and then provided "*that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.*"

The economic situation at the time of the 1910 amendment.

It appears from the record (Transcript, fol. 27) that the telegraph lines operated and controlled by the Telegraph Company comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire. That upon such system of telegraph lines the Telegraph Company has nearly 25,000 offices, about 20,000 of which offices are railroad offices yielding revenues too small to pay for maintenance separate and apart from the advantages derived from contracts with railroad companies and which but for such contracts could not be maintained as independent telegraph offices and would not, therefore, afford telegraphic facilities to the public. That a very large part of such telegraph system is constructed under and in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad systems throughout the United States, said contracts being similar in the underlying provisions to the contract annexed to the bill.

If such contracts were destroyed, with the result that the telegraph companies would be obliged to seek rights of way, either on public highways, could they obtain the local rights to do so, or across private rights of way, it would entail not only the expenditure of immense sums of money for the relocation and reconstruction of such lines, besides the acquisitions of such new rights of way, but would also entail the expenditure of immense sums of money for maintenance in excess of the requirements of maintenance of the lines constructed along the rights of way of the railroads, for the reason that the transportation of materials along the railroads' rights of way is a comparatively simple

matter compared with the distribution of the heavy material over private rights of way or along public highways.

All such waste and useless expenditure would necessitate heavy increases in rates for telegraphic service to the detriment of the public. Furthermore, the forced abandonment by the telegraph companies of offices in railroad stations would deprive the public of any telegraphic service whatever in those communities too small to support independent commercial telegraph offices, and still further, the destruction of the lines of telegraph erected on the rights of way of the railroads would require the immediate construction by the railroads of their own telegraph lines at an expenditure of immense sums of money that necessarily, even if obtainable, would be reflected in the rates which the railroads might lawfully demand.

The Congress was therefore confronted with the great public interest involved in the preservation of these contracts as they existed and was advised by the Commission which had investigated them and which had caused them to be filed with it as its public records for examination, that the Commission was unable to see any way in which the full performance of the contracts would affect any public or private interest adversely.

Is it reasonable to suppose that the Congress intended to destroy this complicated and important economic situation? Can any other motive be attributed to the Congress or any other interpretation be placed upon its language than that these contracts should be preserved in their entirety and the legality of them should be placed beyond doubt?

The most cursory examination of the contract here under consideration, and it is typical of all these contracts, discloses the complicated interweaving of the mutual considerations passing from each party

to the other. The Railroad Company furnishes a right of way. A railroad right of way is not public property, though sometimes called a highway and subject to a certain extent to State and Federal control. A telegraph company cannot, therefore, under the Act of 1866 (Post Roads Act) occupy a railroad right of way except by the consent of the railroad or under the power of eminent domain; and in the absence of Federal or State provision for the exercise of such right of eminent domain, the railroad right of way can be occupied with telegraph poles only with the consent of the railroad company. (Judson on Interstate Commerce, 3rd Ed. p. 106; *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540).

As was said by Mr. Taggart in his memorandum to the Commerce Commission submitted on the application for the construction of the Conference Ruling of July, 1914 (Brief for the Western Union Telegraph Company filed herein in this Court, pp. 79-80), the railroad

> "furnishes transportation. It furnishes labor in various ways. It furnishes space, light and heat in its railroad stations, storage facilities in its warehouses, docks and yards for material. It furnishes the distribution in connection with the transportation of material along its roads. These are some of the contributions of a railroad company in the way of services and constitute some of the considerations under which telegraph lines have been created and are being operated, maintained and reconstructed as needed. The Telegraph Company on its part furnishes material, poles, wires, cross-arms, insulators, skilled labor in a greater or lesser degree, according to the particular contract, patent rights, instruments and other equipment, and in addition thereto, the transmission of messages in large amounts each year.
>
> In making these contracts necessarily all the considerations on one side are estimated and

compared with all the considerations on the other, and these considerations are as a whole considered by the parties to the contract as being respectively fair equivalents each for the other. It is, therefore, obviously impossible to separate the mere transmission of messages by the Telegraph Company, on the one hand, or the transportation of telegraph material either for use on the line of the railroad or for use off the line of the railroad, by the Railroad Company, on the other."

In the contract in question, after all other mutual considerations are cared for, there is the requirement of the payment by the Telegraph Company to the Railroad of $60,000 a year in cash during the continuance of the agreement. The agreement is for a term of fifty years, with provision for renewals after the expiration of that term for further terms of fifty years by the mere giving of notices.

A contract made in violation of the common or statutory law is incapable of being enforced either at law or in equity; and a contract legal in its inception, but thereafter made illegal by a statute, stands on the same footing as regards any performance thereunder after the taking effect of the prohibitive act. Furthermore, if the illegality goes to only a part of the consideration, still if the contract is entire and the illegal part may not, therefore, be expunged without destroying the whole structure of the agreement, the whole contract is tainted and falls with that illegal element.

Trist v. *Child*, 21 Wall. 441;
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, 70 N. E. 843;
Bank v. *Owen*, 2 Peters, 527;
Thomson v. *Thomson*, 7 Ves. Jr. 470;
United States v. *Dietrich*, 126 Fed. 671;
American Mercantile Exchange v. *Blunt*, 102 Me. 128;

Kahn v. *Wilhelm*, 177 S. W. 403;
Lowey v. *Granite State Provident Assn.*, 8 Misc. N. Y. 319;
Foley v. *Speir*, 100 N. Y. 552;
Haynes v. *Rudd*, 102 N. Y. 372;
Schwepy v. *Stevens*, 177 Fed. 484;
Union Central Life Ins. Co. v. *Berlin*, 90 Fed. 779.

The contract in question here is entire. The covenants to be performed on one side are interdependent with those to be performed on the other, and the agreement as a whole shows that the total of considerations passing from one party to the other were intended to be equivalent to and the counterpart of the total of the considerations received in return. To attempt, therefore, to sift out from one of these agreements any single provision as, for instance, the transportation of materials that may be routed over the railroad and destined to points beyond its lines, and that is the only point that the Commission attempts to sift out on that side of the contract, and as, for instance, the transmission by the Telegraph Company of railroad messages, which is the only point that the Commission attempts to sift out on the other side, particularly when those features have been so carefully covered and provided for in a way that evidences accurate calculation as to the relative values to the respective parties, is to destroy the contract *in toto*.

The Congress may regulate common carriers, but it cannot make contracts for them. The contract in question provided, as we have seen, for a closely calculated and accurately balanced interchange of services between the parties, which constituted the considerations moving by each party to the other. It may well be that such a contract could be destroyed *in toto* by Congressional action. In fact, since the decisions in the Mottley case (*Louisville & N. Co.* v.

Mottley, 219 U. S. 467) and the advertising cases (*Chicago, Indianapolis & Louisville* v. *U. S.*, 219 U. S. 486), there can be no doubt but that contracts lawfully entered into by a railroad may be so destroyed by act of the Congress, but no such contract can be partially destroyed with the result that the rest of the contract is binding upon the parties. To hold that would be to hold that the Congress may make contracts for the carriers. To hold that would be to hold, for instance, where a railroad had contracted for the purchase of a quantity of steel from the United States Steel Corporation at an agreed price fixed low because for a large quantity extending in deliveries over a period of years, that the Congress might pass a law whereby such railroad would be prohibited from purchasing steel except on annual contracts, and yet the Steel Corporation would be obliged to sell the steel at such reduced price in small quantities and only on annual contracts. This is not the law. If the contract is destroyed in an essential feature, a feature which is of its essence, then it is destroyed *in toto* and to hold otherwise would be to hold that legislative action might *make contracts for parties.*

The Congress is presumed to legislate with an intelligent knowledge of the law and is presumed to know that if one part of an entire contract is made illegal by express statutory provision or by virtue of its being contrary to the rules of law, the entire contract is tainted with the illegality and falls, and it is not to be presumed that the Congress, having before it this economic situation that obtained throughout the country, growing out of the universal operation of the railroads under these contracts, and having in mind the public interests involved therein and the public benefits derived from the existence and operation thereof and the great public harm that would come from the destruction thereof, intended to destroy these contracts in their entirety. The Con-

gress is to be presumed to have known that the very heart could not be cut out of these contracts without their total destruction. Touching on this point the United States Circuit Court of Appeals, Seventh Circuit, in the case of *Chicago Great Western R. Co.* v. *Postal Telegraph Cable Co.* (249 Fed. Rep. 664, at p. 666) said, with reference to a similar contract between those Companies, and which is now before this Court set for hearing on the same day as this case:

> "So entwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the others. Inasmuch as Congress supposedly was aware of this situation, a confession by appellee that Congress intended to legitimatize the exchange of 'on line' services is a confession, in our judgment, that Congress had the intent to approve the known exchange of services rather than the intent to split the unsplittable and from the fragments to make for the parties a new contract."

Therefore, we contend the Congress did not by the 1910 Amendment intend the construction that has been placed upon that amendment by the Commission, because the Congress did not intend to destroy these contracts in toto and the public benefits flowing from them, which is the necessary result of the Commission's construction.

The reason for the 1910 Amendment.

The Congress knew how the law stood. It knew that these contracts were perfectly lawful as to the telegraph companies. It probably considered that they were lawful as to the railroad companies, but it knew that the Commission had said that they were not lawful as to the railroad companies as to the "off line" provisions. It knew how fatal that interpreta-

tion would be to the public interests, how it would result in needless waste of immense capital, necessarily increasing the cost to the public of both telegraphic and railroad service, in hopeless curtailment of telegraphic service to the public, which service could not be supplied in any other way. It intended to extend a few only of the provisions of the Commerce Act to the telegraph, cable and telephone companies, putting them in the category of common carriers and subjecting them to proper supervision and control, and in doing so it intended to and did clarify the situation and place beyond all question of doubt the legality of these contracts by providing affirmatively that they should be legal.

Forty-four years prior to the Amendment of 1910 the Congress had passed a statute (R. S., § 5263, *et seq.* The Post Roads Act), whereby it gave to telegraph companies the right to construct their lines along the post roads of the Government, which necessarily included railroad rights of way, thus putting these vital instrumentalities of commerce and government beyond the reach of selfish State legislation, and in return exacting of the telegraph companies preferred service for the Government. This statute did not, however, give to the telegraph companies the right of eminent domain and if they desired to occupy post roads belonging to individuals, municipalities or railroads, the consent of the owner was an essential prerequisite for which such owner might demand compensation in money or in kind.

Western Union Telegraph Co. v. *Pa. R. R. Co.*, 195 U. S. 540;

Western Union Telegraph Co. v. *Richmond*, 224 U. S. 160;

Williams v. *Talladega*, 226 U. S. 406;

Town of Essex v. *New England Telegraph Co. of Mass.*, 239 U. S. 313.

This Post Roads Act contemplated and authorized by necessary implication contracts between telegraph companies and the owners of post roads, including railroads, by the terms of which the telegraph company could secure to itself the right to occupy these rights of way, and no limitation whatsoever was placed by the Congress upon the amount or kind of compensation which they should pay. It was since the enactment of this permissive statute that the contract now under question and probably all others of the same type grew up, and by their growth and existence they made possible the erection and maintenance of tens of thousands of miles of telegraph lines which otherwise would have been impossible of realization. This increased means for telegraphic communication, made possible by these exchange agreements, was of an importance to the Government which is scarcely capable of exaggeration.

The Congress knew this and it knew that unless these exchange contracts, which, as we have seen, had been challenged by the Commission, were preserved and legalized beyond all cavil, future expansion of telegraphic communication, resulting in knitting the Government more closely together and facilitating the administration of hundreds of its functions, would be curtailed to a great and disastrous extent. In this knowledge of the immense benefit to the Government of the rapid expansion of telegraph lines lay, beyond all shadow of doubt, one of the most potent reasons for the express legalization of these exchange contracts by the Amendment of 1910.

The meaning of the 1910 Amendment.

We have quoted above the portions of Section 1 of the Commerce Act as amended in 1910 so far as that Section relates to the present case, showing

what language was inserted by the amendment. It would be difficult to see how language could be plainer. The Congress provided not only for the exchange of services between the *corporations*, but it even went further and provided for the exchange of passes and franks between such corporations for the use of the officers, agents, and employees thereof and their families. Can it seriously be argued that the Congress intended that the families of employees may enjoy *free passes* and *franks* and yet that the railroads and the telegraph companies may not pursue their time honored contracts evolved after years of experience and after extended negotiations, nicely balanced as to corporate values accruing to each party, creating for the benefit of the public a countrywide telegraphic service otherwise unobtainable, making for the efficiency of the construction of telegraph lines by using the railroads' rights of way and involving investments of vast sums of money and the building of permanent structures on the properties of the railroad companies? Can it be seriously argued that the Congress intended, particularly in the face of the reports of its Commission that these contracts affected no public or private interest adversely, to destroy these contracts when it used the words "*and provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services*"?

A proviso often extends rather than limits legislation. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174–181. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25–37. *American Express Company* v. *United States*, 212 U. S. 522.

And it must be borne in mind, as we have sought to point out and earnestly urge, that these indivisible contracts cannot be tampered with in part without the destruction of them as a whole.

In this connection, it is well to notice what seems to have escaped the attention of the Commission, that while the contracts speak of "free service" and while the Commission permits such "free service" for "on line" transportation, and while the Commerce Act permits *absolutely free service in the way of free passes and franks* between officers, agents, employees and their families, of railroad and telegraph companies, there is in fact *no free service performed under these contracts by either the railroad for the telegraph company or the telegraph company for the railroad.* "Free" as used in these contracts means that that particular service is absorbed in the general considerations moving from each party to the other. It is not gratuitous service. The Railroad furnishes the right of way to the Telegraph Company. We do not know of what value it is, but its value would run into enormous figures. The Telegraph Company pays the Railroad in one item $60,000 a year for every year of the contract. The Railroad furnishes operators and offices and labor, and the Telegraph Company furnishes its parts of the complicated arrangement, and then to show the nicety with which the mutual considerations are balanced, an upset amount of transportation at regular rates is calculated and it is provided that beyond that a different rate shall be charged, and in the same way, an upset amount of telegraphic service at regular rates is provided and beyond that a different rate shall be charged, but the service and transportation that relate solely to "on line" business and which is called in the contract for convenience "free", is absorbed and provided for as a part of the general exchange of values between these two corporations.

It is contended by the Commission that the exchange of services provided for must be an exchange of such services calculated at the regular rates. *Non constat* if the contract could be analyzed and valuations could be placed upon the rights of way

and all the multitude of services and benefits derived by each of the parties thereto, it would transpire that the services are exchanged at greater than regular rates. But that is not the point.

The first fallacy lies in the idea that the exchange must be measured by dollars.

This Court, in one of the advertising cases, said:

> "The legislative department intended (by the Hepburn Act) that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money, which has a certain value known to all, and not in commodities or services or otherwise than in money". *Chicago, I. & L. Ry. Co.* v. *U. S.*, 219 U. S. 486, 496.

That case arose before the 1910 Amendment, although the decision above quoted was rendered subsequent thereto, but that case was not referring to any of the "specified exceptions" of the statute. It was discussing the right of a railroad to sell to the public transportation for advertising. These telegraph-railroad contracts were added to the "specified exceptions" and the Congress by the 1910 amendment specifically authorized such companies to exchange services.

To exchange services for services does not require that the services shall be translated into dollars. That would be merely keeping books and not exchanging services at all. If A agrees to exchange with B cattle for grain, to use the example given in Webster's definition of "exchange", A determines in his own mind that an ox is worth to him 100 bushels of grain, and B determines that 100 bushels of grain are worth to him one ox. A does not say to B "I will send you cattle for which I will bill you at

$100 per head, and you may send me grain for which you will bill me at $1 per bushel". To do so would not be *exchange* at all, but the purchase and sale of cattle and grain. A says "I will exchange one ox for 100 bushels of grain".

The word "exchange" has a clearly understood, definite meaning, not only in ordinary conversation but in the legislation and the decisions in this country. The Civil Code of Louisiana, adopting the substance of the old Spanish Code, defines exchange as follows [Article 2660]:

> "Exchange is a contract, by which the parties to the contract give to one another, one thing for another, whatever it be, except money; for in that case it would be a sale."

The old Civil Code drafted by Mr. Field for the State of New York, but which was never adopted, defined exchange as follows:

> "Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing, or both things, being money only." *Field's New York Civil Code*, § 903.

Exactly the same language has been adopted by the Civil Codes of the following States, the provision in California having been enacted as far back as 1872, viz.:

> Civil Code of California, § 1804;
> Civil Code of North Dakota, § 6003;
> Civil Code of South Dakota, § 1348;
> Civil Code of Montana, § 5129.

In the old case of *Buffum* v. *Merry*, 4 Fed. Cases, 605, Circuit Judge Story in the Circuit Court for the Rhode Island District, said:

> "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price

or recompense in value. If it be a commutation of goods for goods it is more properly an exchange."

The distinction has been recognized by the highest courts of the following States among others:

Supreme Court of Alabama.

"Where one article or set of goods is intended to be exchanged for another, no price being attached, it is not a sale, for the transaction is, in the first instance, made by an exchange of goods without reference to money payment." *Coker* v. *the State*, 8 Southern Rep. 875.

Supreme Court of Arkansas.

Chief Judge English in *Cooper* v. *the State*, 37 Ark. 412, at page 418 says:

"A sale is an exchange of goods or property for money paid or to be paid. Barter and exchange are of about the same meaning. Barter —the exchange of one commodity or article of property for another. Exchange of goods—a commutation, transmutation, or transfer of goods for other goods as distinguished from sale, which is a transfer of goods for money."

This case was cited with approval in *Meyer* v. *Rousseau*, 47 Ark. 463.

Supreme Court of California.

"'Sale' in law has a well defined meaning and trustees empowered to sell real estate are not authorized to exchange it for other lands." *Chapman* v. *Hughes*, 134 Cal. 641, 657.

Supreme Court of Indiana.

"The exchange of one article for another is a barter, but the question of price does not necessarily enter into the transaction and in that respect a barter differs from a sale." *Forkner* v. *the State*, 95 Ind. 406.

Supreme Court of Iowa.

In *Beardsley* v. *Cottrell & Babcock*, 43 Ia. 194, at page 204, the Court says:

> "Sale means at all times a contract between parties to pass rights of property for money, which the buyer pays, or promises to pay the seller. *Williamson et al.* v. *Berry*, 8 Howard, 544; *Bigley* v. *Risher*, 63 Penn. St., 155. Where a party mortgages a chattel with power of sale, he is entitled to the excess of the proceeds of the sale over the amount of the debt secured, and the mortgagee has no right, without the consent of the mortgagor, to barter the mortgaged property for other, or to compel the mortgagor to take in anything else than money the excess in value of the mortgaged property over the debt secured."

Supreme Court of Mississippi.

In distinguishing exchange from sale, the Supreme Court in *State* v. *Austin*, 23 Southern Rep. 34, says:

> "A sale means at all times a contract between parties to give and pass rights and property for money."

Supreme Court of Nebraska.

Laboree v. *Klosterman*, 33 Neb. 150.

The charge in the court below was in the following language:

> "To sell property is to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. A sale differs from a barter in this; that in a barter the consideration instead of being in money is paid in goods or merchandise susceptible of a valuation."

The Supreme Court, in approving such charge, said:

> "The Court drew the proper distinction between 'barter' and 'sale'. If the notes were

paid for in money it was a purchase and sale. If the consideration for the transfer of the notes to Lewis was other notes, then the transaction was an exchange or barter."

In New York.

Mr. Justice Gaynor in *Moran* v. *James*, 20 Misc. 235, says:

> "In the law of principal and agent authority to sell does not imply authority to exchange. This so accords with common understanding that it is difficult to find that a case has arisen about it. *McMichael* v. *Wilkie*, 18 Ont. App. R. 464. The same is the case with the law of powers and trusts. A power of sale in a will or trust deed does not authorize an exchange or a mortgage." (Citing several New York State cases.)

In *Elwell* v. *Chamberlin*, 31 N. Y. 611, at page 624, the Court of Appeals in the concurring opinion by Mullin, *J.*, says:

> "In Chitty on Contracts, 374, it is said, the difference between a sale and exchange is this, the former is a transferring of goods for money, the latter for goods by way of barter. In either case, the same rules of law are prescribed for regulating the transaction. In Domat's Civil Law, exchange is defined to be 'a covenant by which the contractors give to one another one thing for another, whatever it be, except money; for in that case, it would be a sale.' In exchanges of one kind of chattels for another, it is impossible to establish usury, because chattels have no fixed value; parties may call the value of them what they please, and so long as there is no standard by which to ascertain and determine their real worth, it cannot be said, that usury is taken, even if it applied to any dealing except loans."

Supreme Court of Ohio.

Jenkins v. *Mapes*, 41 N. E. 137.

> "True, a barter usually consists of an exchange of commodities differing from each other in kind; and doubtless most frequently mutual delivery of the respective articles occurs contemporaneously. These conditions, however, though the usual, are not necessary incidents of a barter; a transaction being equally a barter if goods of the same kind are exchanged and the delivery by one party is to be made in the future as though they were of different kinds and the delivery made simultaneously by both parties when the bargain was made. The distinguishing feature of a barter is that goods are exchanged for goods instead of money; and to constitute a transaction a barter it is no more essential that the delivery should be made by both parties at the time the bargain is made than it is necessary, in order to constitute a sale, that the price should be paid contemporaneously with the delivery of the goods which are the subject of the transaction. Bouvier says of barter that it differs from a sale in that a barter is always of goods for goods, a sale is of goods for money or for money and goods. In a sale there is a fixed price, in a barter there is none."

Supreme Court of Pennsylvania.

In the case of *Jermyn* v. *Elliott*, 45 Atl. Rep., at page 950, the Court says:

> "A clear, explicit and unambiguous contract and a taking of possession under and in pursuance of the contract are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to or dependence on any other subject. The evidence of possession taken of it is, therefore, confined to the single subject and if not taken in a reasonable time or so as to make it doubtful whether it is attributable to the contract the parol sale is not taken out of the statute. But an

> exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other. So much so that the law implies a contract of warranty by the act of exchanging."

Supreme Court of Vermont.

> "This count alleges a sale with warranty. The evidence shows an exchange. These are legally different contracts and in strictness an averment of one is not supported by proof of the other." *Vail* v. *Strong*, 10 Vt. 457, 465.

Supreme Court of Wisconsin.

In *Long* v. *Fuller*, 21 Wis. 121, at page 124, the Court says:

> "The argument of the respondent's attorney is, that this word 'exchange' is used in the letter of attorney as in common conversation in reference to trade or traffic in chattels. Even when so used, if used with precision, it means a commutation of goods for goods; for if goods are transferred for money it is a sale. And although sometimes in loose conversation, persons may speak of exchanges of goods when a small part of the value is paid by one of the parties in money, yet, we apprehend, seldom or never when the greater part is paid in money."

Exchange is made in kind and depends upon the bargain. Exchange implies merely a relative value. The very word means that what are given and received are valued by the parties to the transaction in terms not of money but of the things exchanged. The values are not the *sale* values, but the *exchange* values. The exchange values have nothing to do with nor do they necessarily have any relation to the sale or market values. That a service is of great value to one does not prove that it is of any value to another. That anything is of great value to one does not prove that it is of any value to another.

But the statute is not barren of help on this point. Every word of a statute must be given effect provided it develops no internal contradiction in the enactment and does not thwart the obvious intention of the Legislature. In *United States* v. *Ninety-nine Diamonds*, 139 Fed. 961, the Court at page 963 says:

> "Cardinal rules for the interpretation of the law are that the intention of the legislative body should be ascertained and given effect, and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the legislature did not express its intention by a portion, but by all the law upon the subject. An interpretation which restricts this deprivation clause to the guilt of 'any wilful act or omission' flies in the teeth of the maxim that 'all the words of a law must have effect, rather than that part should perish by construction.'"

In *Van Patten* v. *Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545, 547, the Court says:

> "The intent of Congress is to be gathered from a consideration of the entire Act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to wit, that, in determining the meaning of the words employed, the general purpose of the Act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the Act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the Act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose."

The statute itself is not barren of help as to what is meant by exchange. The amendment says that "nothing in this Act shall be construed". Section 2 of the Commerce Act provides that if any common carrier subject to its provision shall by any special rate, charge, demand, collect or re-

ceive a greater or less compensation for any service rendered in transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him *a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions*, such carrier shall be deemed guilty of unjust discrimination, which is prohibited.

Section 3 of the Commerce Act provides that it shall be unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person or any particular description of traffic in any respect whatever or to subject any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

It is apparent, therefore, that it is not every special contract between a railroad company and another that is condemned by the Commerce Act regardless of whether it injures another or not or whether it be reasonable or not, but to be within the condemnation of the statute such special contract must be inherently vicious or either the actual or potential means of injury to others.

When Section 2 declares that special rates shall not be tolerated, it qualifies it with the words "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions".

The necessary implication from this is that if the service between two or more persons is not like or contemporary or if the transportation is of a different kind and made under different circumstances and conditions than the services rendered another, then special contracts governing such special conditions may be made without violating any law or legal principle.

So when Section 3 says that it shall be unlawful for any common carrier to give any undue or unreasonable preference or advantage, the necessary inference is that if the preference or advantage given is not undue or unreasonable, then it may be given under a special contract governing special circumstances.

Mr. Justice Shiras discussed the second and third sections of the Commerce Act and the propriety of recurring to the history of the legislation in reaching conclusions as to the proper construction of statutes, in the case of *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, at page 218, *et seq.*

As was well said in one of the briefs submitted in the Maryland case between these same parties, in discussing the effect of the words "or different" (compensation) in the Hepburn Act, before the saving provision of the 1910 amendment had been enacted:

> "These sections clearly reveal the purpose of Congress,—a wise and beneficent purpose. It is from these sections, and from the statute as a whole, that the intention of Congress must be derived and not from a single word, dropped like a grain of sand in a delicate and complicated mechanism.
>
> The railroad and telegraph are the Siamese Twins of commerce, born at the same period of time, developed side by side, united by necessity; and we respectfully submit that what the laws of trade and usage have thus joined together it could not have been the purpose of Congress to put asunder by the mere use of the words 'or different'. So radical and revolutionary a change would have been expressed in plain and unmistakable language."

It is proper now, since the enactment of the Amendment of 1910, to add that because the Commission had raised the question and had ruled that

the purpose of the Congress was to put asunder what the laws of trade and usage had joined together, the Congress took practically the first opportunity after its attention had been called to this ruling to assert in positive language that such had not been its purpose, and that it meant that nothing in the Act should be construed to prevent these contracts.

The second fallacy in the interpretation by the Commission lies in the understanding of what is meant by "services". "Service" as defined by the Century Dictionary is "an advantage conferred or brought about; the performance of any office or labor for another; assistance rendered". Webster defines "service" as "advantage conferred; benefit".

We have already noted what some of these services are that are performed by the parties to this contract and which they exchange in accordance with the terms thereof and in accordance with the express authority of the statute. To repeat, some of them are, on the part of the Railroad, the furnishing of a right of way, the furnishing of transportation, of labor in various ways, skilled and unskilled, of space, light and heat in its stations, of storage facilities in its warehouses, of docks and yards for material, of distribution in connection with the transportation of material along its routes; and on the part of the Telegraph Company, of material, poles, wires, cross-arms, insulators, skilled labor, patent rights, instruments and other equipment, and the transmission of messages.

The Commission seems to assume that the word "services" refers merely to the transmission by the Telegraph Company of telegraphic messages and the transportation by the Railroad Company of freight and passengers, but these are only a part of the services that are contracted for under the contracts and that are agreed to be exchanged.

And how may these services be valued except by

the parties to the contract? There is no provision in the Commerce Act for filing rates or fares or charges in respect of any of such services that are to be performed by the Railroad Company, other than the transportation of passengers and property. In fact, the statute is limited to the filing of "schedules showing all the rates, fares and charges for *transportation*". There is no provision, even were it possible to do so, by which the service of furnishing the right of way to the Telegraph Company may be measured or as to which a schedule can be filed or by which the services for furnishing labor or offices or heat or light or tools may be ascertained or the schedules therefor filed.

It was the intention of the Congress in all the legislation developing into the completed Commerce Act to refer to the public interests, to protect and safeguard the public interests, and to guard against favoritism between the carriers, as *quasi* public corporations, and it was not the Congressional intention to strike down these *sui generis* contracts, which do not affect any public or private interest adversely, and thereby to deliver an irreparable blow to the public interests.

Behind this interpretation by the Commission there lurks the inbred fear that in some way the railroads intend to indulge, if given the chance, in a carnival of dissipation of their assets and of distribution of favors and preferences. We find the same underlying fear in the mind of the learned counsel for the Commission, expressed in the consideration of the so-called Pass Case. This Court in that connection in its opinion (*United States* v. *Erie Railroad*, 236 U. S. 259, at pages 271, 272), said:

> "Counsel for the United States sounds an alarm at such extension and lets imagination loose in portrayal of its consequences and sees included 'tap lines and other industrial rail-

roads, street car lines, local traction companies, omnibus transfer companies and herdic lines, hackmen, boatmen, ferrymen, truckmen, lumber flumes, bucket lines for ore, parcel deliveries, district messenger services, carriers of all descriptions, both in this country and abroad '—a formidable enumeration, it must be admitted. And there must be included, too, all their officers, all their employees and their families. There is, however, an opposing picture. It is conceded that carriers subject to the act may interchange passes, the officers and employees of each carrier receiving free transportation, and giving it to every other carrier subject to the act, making an army of the privileged with the same discrimination and the same burden on the passenger service of the railroads as in the illustration of the Government. There is no argument, therefore, in a comparison of the possibilities under one construction rather than the other. At best it is but a comparison of the excesses which may be but are not likely to be practiced. *Counsel seem to think that the railroads have an eager desire to distribute passes and burden their transportation service with a crowd of free passengers. Congress certainly had no such view and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. The cases at bar are a typical instance of its exercise. It has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them.*" (Italics ours.)

To give the statute the interpretation contended for by the Commission would be to rob it of all meaning.

The amendment was not needed to accomplish the result contended for by the Commission, which amounts merely to the keeping of books of account between the companies. The Telegraph Company

could certainly transmit telegrams for the Railroad and bill them at usual rates, just as it transmits them for all of its large customers and bills them each month, and the Railroad could certainly move freight for the Telegraph Company and bill it monthly at published tariff rates. It required no proviso to authorize either transaction, and so to give the statute that interpretation is to say that the statute accomplished nothing and meant nothing and added nothing to the law. Courts will not indulge in such construction of statutes. They will assume that enactments are made for some purpose.

The distinction made by the Commission in its March 28, 1916, conference ruling as to "on line" service is unwarranted. That such a construction was not the one intended by the Congress is clear from the language of the amendment. That language is that nothing in the Act shall be construed to prevent telephone, telegraph and *cable companies* from entering into contracts with common carriers for exchange of services. There is no "on line" service that a railroad can perform for a *cable* company, that is, no service in hauling freight to be used by the cable company along the line of the railroad, nor any service in transporting passengers to work for the cable company along such line of the railroad. The cable company does not operate along the line of a railroad. The Congress made no distinction between "on line" and "off line". If "on line" service may be lawfully performed under the terms of the contract, then "off line" service may be so performed. The United States Circuit Court of Appeals, Seventh Circuit, in *Chicago Great Western R. Co.* v. *Postal Telegraph Cable Co.* (*supra*) said (249 Fed. Rep. 666):

> "Appellee is a telegraph company. But cable companies are included in the same terms. Appellee enumerates 'on line' services it renders

for appellant; but so far has failed to state how an undersea cable could be of 'on line' service to a railroad, or how a railroad could be of 'on line' service to a cable. Appellee's contention that the proviso authorizes nothing but contracts for exchange of 'on line' services (services on a common or joint right of way) therefor comes to this: Railroad and cable companies are authorized to contract with each other, but only for the performance of unperformable conditions."

The complainant-appellee has no adequate remedy at law.

There is no adequate remedy at law unless it is an affirmative remedy Even though the Railroad, if sued by the Telegraph Company for full rates for telegrams irrespective of the provisions of the contract, might set this contract up as a defense and therein have the whole question determined, yet it is not obliged to do that. The test is, can the Railroad set up this question in a suit at law instituted by itself? Manifestly it cannot, and, therefore, it has no adequate remedy at law and is entitled to invoke a court of equity not only for the specific performance of the contract, but also to enjoin a multiplicity of suits:

Bank of Kentucky v. *Stone*, 88 Fed. 383;
United States Life Ins. Co. v. *Cable*, 98 Fed. 761;
Schmidt v. *West*, 104 Fed. 274;
Mutual Life Ins. Co. v. *Pearson*, 114 Fed. 395;
Union Life Ins. Co. v. *Riggs*, 123 Fed. 312.

Conclusion.

It is respectfully submitted that the reason assigned by the Telegraph Company that because of the promulgation by the Commission of the Conference Ruling of March 28, 1916, it would not continue to carry out the contract in all respects and in accordance with the terms thereof, is not well founded and is not a valid excuse for failure to observe the contract; that the contract is not prohibited by the Commerce Act, but in each and every part is expressly authorized by the terms thereof and is lawful as to both parties thereto in all respects; that the Telegraph Company is without legal excuse for its failure to fulfill its obligations under the contract in every respect, and that the Railroad, being without adequate remedy at law, is entitled to judgment requiring defendant specifically to perform its contract accordingly and that the decree should be affirmed.

Respectfully submitted,

J. DuPratt White,
Attorney for Appellee.

George F. Brownell,
Vermont Hatch,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 554.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF COUNSEL FOR THE POSTAL TELEGRAPH CABLE COMPANY AS AMICUS CURIÆ.

Leave of court having been first obtained, we respectfully urge that the motion made herein to advance this cause for hearing be denied, or that decision thereon be postponed until the case of the Chicago Great Western Railroad Company, plaintiff, *vs.* The Postal Telegraph Cable Company, defend-

ant, now pending in the United States Circuit Court of Appeals for the Seventh Circuit, is before this Court, in order that the two cases may be heard together; and in support thereof submit the following:

Both cases call in question the validity of the same ruling of the Interstate Commerce Commission. In the case of the Chicago Great Western Railroad Company *vs.* Postal Telegraph Cable Company, *supra*, the plaintiff by its bill sought a mandatory injunction to compel the performance by the defendant of a certain contract entered into between the defendant and the Chicago, St. Paul and Kansas City Railway Company, of which plaintiff is successor, and also to restrain the prosecution of certain actions at law for the recovery of compensation for telegraphic service rendered to the plaintiff. The case was tried before Judge Evans in the District Court of the United States, Northern District of Illinois, Eastern Division, and decided in favor of the defendant. Whereupon an appeal was taken to the Circuit Court of Appeals, and has been specially set for hearing February 6, 1918.

It is believed that the record in the case at bar does not present all the facts necessary for proper consideration of the questions involved, for the reason that there is no real contest between the plaintiff and the defendant. It is evident that both parties desire that the Interstate Commerce Commission's ruling be held invalid. No testimony whatsoever was taken. The record consists merely of the bill of complaint and answer. The answer admits the allegations of the bill of complaint, and we believe it can be made apparent that the bill of complaint does not fully and fairly present the case. The Interstate Commerce Commission was not called in until after the record was made up. The Court of Appeals opens its opinion in that case by saying:

> "The real contest in this case is between the plaintiff and defendant on the one side and the Interstate Commerce Commission on the other."

There is a real contest in the case of the Chicago Great Western Railroad Company *vs.* The Postal Telegraph Cable Company. The defendant in that case is vitally interested in having the ruling of the Interstate Commerce Commission sustained. The case was closely contested and brings out all of the points in favor of the Commission's ruling, and is complete in its evidence and testimony. It is significant in this connection that in the Postal case the decision was in favor of, while in the Western Union case it was against, the validity of the Interstate Commerce Commission's ruling.

The attorneys for the Chicago Great Western Railroad Company recently filed a motion in the Circuit Court of Appeals and strongly urged that court to postpone the hearing of the case until after the decision by this court in the case at bar. The motion was overruled upon the objection of the Postal Telegraph Cable Company and set for hearing, as above stated, on February 6. In this connection it is interesting to note also that when the Postal Telegraph Cable Company sued the Chicago Great Western in New York for telegraph tolls, the attorneys for the Baltimore & Ohio Railroad Company appeared for the Chicago & Great Western. These facts indicate the possibility that the attempt at delay in Chicago is prompted by a desire to have the question decided by this court solely on the more incomplete record in the case at bar.

The Postal Telegraph Cable Company has taken great pains and gone to great expense to fully present its case, and is vitally interested in the outcome, and sincerely prays that this court will give it an opportunity to present to it the result of these efforts before it finally passes on the validity of the Commission's ruling. It is believed that this will involve a delay of probably only three or four weeks. Just as soon as the record in the Postal Telegraph Company case is before this court, we will gladly join in a request for an early hear-

ing, and believe that such request will then be concurred in by the counsel for the Interstate Commerce Commission.

Respectfully submitted,

W. W. COOK,
BYNUM E. HINTON,
Counsel for Postal Telegraph Cable Company.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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THE WESTERN UNION TELEGRAPH COMPANY,

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VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

Comes now J. DuPratt White, appearing on behalf of the appellee, The Baltimore and Ohio Railroad Company, complainant below, and respectfully moves the Court to advance the above entitled cause for hearing to a near day convenient to the Court.

This suit was brought in the United States District Court for the Southern District of New York,

by The Baltimore and Ohio Railroad Company against Western Union Telegraph Company on a bill in equity praying adjudication (1) that a certain contract between the parties, made October 15, 1887, is lawful and binding; (2) that the Telegraph Company be required specifically to perform the contract; and (3) that the Telegraph Company be perpetually enjoined from violating the contract.

The contract in suit provides for the use of the Railroad's right of way for the lines of the Telegraph Company and otherwise for the exchange of services between them. It is one of hundreds of similar contracts that for half a century have existed between railroad and telegraph companies.

The Western Union Telegraph Company has refused to perform a vital part of the contract, viz., the transmission of messages on the agreed terms, assigning as its ground for refusal certain of the provisions, as construed by the Interstate Commerce Commission, of "An Act to regulate Commerce", commonly known as the "Commerce Act", as amended.

On March 28, 1916, the Interstate Commerce Commission promulgated a conference ruling construing an amendment to the Commerce Act, which read:—

> "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.",

as requiring that such services must be exchanged upon the basis of the lawful rates of the railroad, as published and filed in accordance with the provisions of the Commerce Act, and of the reasonable charges of the telegraph company regularly charged other customers for similar services, except so far as such services related to "on line" transactions.

Such conference ruling requires the exchange of services between the Railroad and the Telegraph Company upon a different basis from that which obtains in said contracts.

Since the promulgation of such ruling and pending final determination of the matter by the Courts, the railroads and the Telegraph Company have kept open accounts as to their inter-relations, and until such final determination will be unable definitely to decide what obligations are mutually owing.

The United States District Court, in its opinion below, said:

> "The contract between these parties is typical of contracts between railroad companies and the Telegraph Co. throughout the United States and the importance of the question may be realized when it is stated that the telegraph lines operated and controlled by defendant comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire, that defendant has nearly 25,000 offices, about 20,000 of which are railroad offices, yielding revenues too small to pay for maintenance separate and apart from the advantage derived from contracts with the railroad companies and that a

> very large part of defendant's system is constructed in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad sytems, all such contracts being similar in their underlying provisions with that between the parties to this suit."

In both said District Court and the United States Circuit Court of Appeals, Second Circuit, the Interstate Commerce Commission filed briefs herein as *amicus curiæ*.

Said Circuit Court of Appeals, in its opinion affirming the decree herein, said:

> "The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other, and the sole question presented in argument or by assignment of error is whether under the Act to regulate commerce as amended June 18, 1910, it is lawful for railway and telegraph companies to observe the terms of a contract made between them (and lawful when made), long before passage of the statute referred to."

The President of the United States in his Proclamation of December 26, 1917, assuming control of the railroads of the United States, said:

> "Until and except, so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing

statutes and orders of the Interstate Commerce Commission".

and further in said Proclamation said:

> "The director shall as soon as may be after having assumed such possession and control enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of the respective properties on the basis of an annual guaranteed compensation, above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three year period ending June 30, 1917—the results of such negotiations to be reported to me for such action as may be appropriate and lawful."

The bill now pending before the Congress entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes", provides for a guaranteed income to the railroads while under Federal operation on the basis of the average net railway operating income for the three years ending June 30, 1917, called in the bill "standard return", and further provides for the method of determination of such "standard return", and that all such income of the railroads in excess thereof shall be the property of the United States.

This application to advance is made by virtue of subdivision 7 of Rule 26 of Rules of the Supreme

Court of the United States, on the ground that there are special and peculiar circumstances attaching to this case, as shown above to the Court, which emphasize the importance to all the great railroad systems of the country of having as speedily as possible a final determination of the question of the legality of these contracts because of the necessity of adjusting accounts between the railroads and the telegraph companies in order to arrive at the average net railway operating income or "standard return", which is provided for under the President's Proclamation and under the pending act of the Congress in connection with the Federal operation of the railroads.

Respectfully submitted,

Counsel for Appellee.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918

No. 404

POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED APRIL 10, 1918.

(26,426)

(26,426)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 959.

POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Transcript of record from the district court of the United States for the northern district of Illinois	1
Placita	1
Order of October 30, 1916, permitting complainant twenty days from service of order to interpose a reply to any new matter in the answer	2
Order of November 10, 1916, granting leave to file amended bill of complaint, etc.	3
Amended bill of complaint	3
Exhibit No. ..—Conference ruling of Interstate Commerce Commission, etc.	10
Answer to amended bill of complaint	11
Exhibit No. 1.—Ruling of the Interstate Commerce Commission of December 21, 1906	16
No. 2.—Ruling of the Interstate Commerce Commission of June 3, 1907	20
No. 3.—Ruling of the Interstate Commerce Commission of June 30, 1908	21
No. 4.—Ruling of the Interstate Commerce Commission of March 28, 1916	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1918.

Page

Amendment to amended bill of complaint 23
Order of January 11, 1917, granting leave to file amended bill of complaint 25
Reply to answer to amended bill of complaint 25
Order of February 9, 1917, resetting cause for hearing 28
Order of May 24, 1917, granting leave to defendant to amend its answer to amended bill, etc. 28
Certificate of evidence 29
Complainant's evidence 30
Exhibit 1.—Conference rulings of the Interstate Commerce Commission, etc. 30
Excerpts from the 21st and 22nd annual reports of the Interstate Commerce Commission to Congress 34
Conference ruling, etc. 37
Defendant's evidence 38
Defendant's Exhibit 1.—Certificate of the Postmaster General, certifying that the Postal Telegraph Cable Company has accepted all the restrictions and obligations required by law 38
Defendant's Exhibit 2.—Transcript of record in case of John A. Humbird *et al. vs.* Chicago Great Western Railway Company 40
Placita 40
Order of January 3, 1908, appointing special master, etc. 41
Intervening petition of Postal Telegraph Cable Company 43
Agreement, dated December 26, 1888 50
Agreement, dated December 26, 1903 57
Demurrer 64
Report of special master on the intervening petition, etc. 66
Objections to special master's report 69
Order of April 4, 1917, that the objections to report of special master stand as exceptions to report 70
Order of May 4, 1910, approving master's report 71
Certificate of clerk 71
Defendant's Exhibit 3.—Extracts from pages 410 and 411 of the 31st Interstate Commerce report 72
Stipulation as to facts 73
Testimony of Charles M. Baker 75
Complainant's rebuttal evidence 79
Statement of court and counsel as to evidence 79
Testimony of G. O. Perkins 82
Opinion 84
Decree of September 14, 1917 96
Petition for appeal 97
Assignment of errors 98
Order of September 14, 1917, allowing appeal, etc. 100
Appeal bond 101
Order of September 14, 1917, denying motion and declining to grant the order for an injunction pending an appeal, etc. 102
Præcipe for record 103
Certificate of clerk, district court 104
Certificate of clerk, circuit court of appeals 105

Page

Appearances 105
Order as to filing briefs and setting day for hearing..... 106
Order granting leave to Interstate Commerce Commission to file brief... 107
Order of argument and submission..... 107
Opinion, Baker, J..... 108
Judgment 111
Assignment of errors..... 112
Petition for appeal..... 113
Order allowing appeal..... 114
Bond on appeal..... 114
Clerk's certificate 115
Citation and service..... 116

IN THE

United States Circuit Court of Appeals.

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1917.

No. 2548

CHICAGO GREAT WESTERN RAILROAD COMPANY, A CORPORATION,

Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, A CORPORATION,

Appellee.

MR. JOHN BARTON PAYNE,
MR. RALPH M. SHAW,
MR. GEORGE A. KELLY,

Counsel for Appellant.

MR. JACOB E. DITTUS,

Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Honorable Evan A. Evans, one of the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, sitting by designation, in the District Court of the United States for the Northern District of Illinois, on Friday, the fourteenth day of September, being one of the days of the September Term of said Court, begun Monday, the third day thereof, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America, the one hundred and forty-second year. Placit

Present:

Hon. Evan A. Evans, Circuit Judge, Presiding:
John J. Bradley, United States Marshal for said District and
T. C. MacMillan, Clerk of Said Court.

1916. 3 And on to-wit: the thirtieth day of October, 1916, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735.

This cause having come on to be heard on the motion of the defendant herein, notice whereof having been given to counsel for complainant on the 28th day of October, A. D. 1916, and upon the verified affidavit of Edward Reynolds filed herein on this date and on the papers, pleadings and proceedings herein and consent of the solicitors for complainant herein, now, on motion of Jacob E. Dittus, solicitor for defendant,

It is ordered that the complainant be and it hereby is permitted within twenty days from the date of service upon its solicitors of a copy of this order to interpose a reply to any new or affirmative matter set forth in the answer herein, and,

It is further ordered that if such reply be interposed then the defendant shall be at liberty to make such further application to this court as it may deem best, and

It is further ordered that if no such reply be interposed within said twenty days, then that the facts alleged in said answer shall be deemed true and that the point of law involved in this case shall be called up and disposed of before final hearing.

4 And on to-wit: the tenth day of November, 1916, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735

Upon motion of the plaintiff, leave is hereby granted said plaintiff to file amended bill instanter and defendant is hereby ruled to answer the same in twenty days from this date.

5 And on to-wit: the tenth day of November, 1916, came the complainant in said entitled cause, by its solicitors and by leave of Court first had and obtained and filed in the clerk's office of said Court, its certain Amended Bill of Complaint, in words and figures following to-wit:

6 AMENDED BILL OF COMPLAINT.

United States of America
Northern District of Illinois } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Chicago Great Western Railroad Company, a corporation,
Complainant.
vs.
Postal Telegraph-Cable Company, a a corporation,
Defendant. } In Equity. No. 735.

To the Honorable, the Judges of the District Court of the United States, In and For the Northern District of Illinois.

The Chicago Great Western Railroad Company, a corporation, brings this, its Amended Bill of Complaint, against the Postal Telegraph-Cable Company, a corporation, and thereupon shows unto the Court the following:

1. That on December 26, 1888, the Chicago, St. Paul and

Bill of Complaint, Sw. 10.

Kansas City Railway Company was a corporation, organized and existing under and by virtue of the laws of the State of Iowa; that subsequent thereto there was duly and legally organized under the laws of the State of Illinois, the Chicago Great Western Railway Company, which said company succeeded to all the rights and properties of said Chicago, St. Paul and Kansas City Railway Company; that subsequent thereto, to-wit, on August 11, 1909, this complainant was duly and legally organized under and by virtue of the laws of the State of Illinois, and is now a resident, citi-
7 zen and inhabitant thereof, and the successor of all the rights and properties of said Chicago Great Western Railway Company.

2. That the defendant, Postal Telegraph-Cable Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen, resident and inhabitant of said State of New York;

3. That said Chicago, St. Paul and Kansas City Railway Company on December 26, 1888, entered into an agreement with the defendant, Postal Telegraph-Cable Company, a true copy of which is hereto attached, marked Exhibit "A," and made a part hereof, whereby the defendant took charge of the telegraph lines and telegraph property of the Railway Company, with the exclusive right in said defendant to use the right of way of the Railway Company for the construction and maintenance of telegraph lines; the Railway Company further agreed to transport free of charge, under certain restrictions, all employes of the defendant and all materials and supplies for the construction and maintenance of the defendant's telegraph lines. In return for the aforementioned grants and privileges the defendant company agreed to transmit free, but within certain limitations, all business of the Railway Company beyond the railway telegraph line. It was further understood and agreed that the Railway Company was to have the full use of all such wires as were then in operation and the exclusive use of two wires on all extensions of the railway as may thereafter be made.

4. That thereafter on the 5th day of February, 1902, a further agreement was entered into between the Chicago Great Western Railway Company (as the successor of the Chicago, St. Paul and Kansas City Railway Company) and this defendant, Postal Telegraph-Cable Company, a true copy of which is hereto attached, marked Exhibit "B," and made a part hereof, whereby the limitation of ten dollars

($10) per mile beyond the lines of the Railway Company was increased to twelve dollars ($12) per mile.

8 5. That this complainant, Chicago Great Western Railroad Company, is the successor of the Chicago Great Western Railway Company and the Chicago, St. Paul and Kansas City Railway Company, and has assumed all the rights, duties and liabilities arising under the aforementioned agreements, Exhibits "A" and "B"; that this complainant has, ever since it succeeded to the rights and duties and liabilities of its predecessor companies, and now is fully complying with all the covenants of said agreements, Exhibits "A" and "B."

6. That ever since railroad and telegraph companies have operated in this country there has existed between almost every railroad and some telegraph company a contract, all of which contracts are substantially similar to the contract hereinbefore mentioned. That a telegraph service along the line of the complainant is highly desirable, and convenient and necessary to the successful operation of the complainant's railroad; that the complainant could not without such a line safely and satisfactorily perform the duty which it was organized to perform, to-wit, the safe transportation of passengers and merchandise for the public; that, on the other hand, a right of way such as the right of way of a railroad company is highly essential and desirable for a telegraph company, and that the value of the service which the complainant furnishes to the defendant under the contract attached to this amended bill of complaint and marked Exhibit "A" cannot be measured in terms of money; that to change the rate of compensation which the complainant receives from the defendant under the contract aforesaid, substantially destroys and impairs the whole agreement because the compensation which the Telegraph Company is required to pany to the Railroad Company and the services which it is required to furnish may not be calculated in terms of dollars and cents and may not be treated as a special grant

9 or privilege. On the contrary, the complainant avers that the service to be rendered by the Telegraph Company to the complainant is part of the measure of value of the right of way and other cross-considerations rendered by the complainant for the defendant; that the interwoven nature of the contract between the complainant and the defendant, as set forth in said contract, the joint payment and superintendence, the segregation of certain wires for railroad service, the interwoven relationship between the railroad

Bill
mplaint.
Nov. 10,

and commercial service, create a situation that would make it impossible, or, in any event, highly unjust to operate the railroad unless the contract is observed, or unless other telegraph lines are constructed. That any breach on the part of the defendant in failing to observe the obligations and to furnish the service imposed upon it by the terms of the contract can not be measured or accurately determined. That in December, 1906, the Interstate Commerce Commission, construing the Interstate Commerce Act as it then existed, stated its opinion to be that such contracts between railroad and telegraph companies, providing in effect for the use of a railroad's right of way by a telegraph company, and an exchange of services between the two parties, that is, the hauling of freight for the telegraph company by the railroad and the transmission of messages for the railroad by the telegraph company, were lawful contracts, except that such parts of such contracts as stipulated or contemplate that the railroad will furnish free or reduced transportation to the telegraph company in connection with the operation of the telegraph company's lines off the right of way of the railroad company, are unlawful. Thereupon Congress amended the Interstate Commerce Act by inserting in Section 1 of the Act the following provision:

"* * * and provided further that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

That at the same session of Congress, Congress also amended Section 1 of the Act to Regulate Commerce by inserting therein the following provision:

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families, of such telegraph, telephone and cable lines, and the officers, agents, employes and their families, of other common carriers subject to the provisions of this Act."

That by reason of such amendment it became, upon the taking effect of said act as amended, lawful, and still is lawful for railroad and telegraph companies to issue to each other franks and passes by means whereof the officers, agents, and employes of telegraph companies and their families may ride upon the passenger trains of common carriers without paying the published rates for such transportation, and, on the other hand, the officers, agents and employes of common

carriers by railroad engaged in interstate commerce lawfully may send messages, either upon the business of said railroad or their own private business, over the lines of telegraph companies without paying the charges provided for in the published tariffs of said telegraph companies.

That thereafter, on March 28, 1916, the Interstate Commerce Commission ruled that such contracts between railroad and telegraph companies were lawful, but that notwithstanding such amendment the exchange of services must be on the basis of the regular rates. A true copy of said ruling of March 28, 1916, is hereinafter set forth, marked Exhibit "C" and made a part hereof.

11 7. That said defendant acting under the supposition, as complainant is advised and believes, that said ruling of the Interstate Commerce Commission required all telegraph companies to charge for and collect the regular rates and tolls on all messages sent by railroads over the lines of the telegraph companies, brought suit against this complainant. That said suit was instituted in the Municipal Court of the City of New York, Borough of Manhattan, First District, entitled "Postal Telegraph-Cable Company, Plaintiff versus Chicago Great Western Railroad Company, Defendant." The complaint sets out that during the specified month the telegraph company transmitted for the railroad company, or at the request of the railroad company, divers and sundry interstate messages to and from New York City and elsewhere, and that during said month said telegraph company, at the request of the railroad company, rendered services for the railroad company in transmitting interstate telegraph messages to and from New York City and elsewhere, and that said services and the delivery and transmission of said messages are reasonably worth a specified sum, no part of which has been paid. That in said action said telegraph company sought to recover upon a quantum meruit and wholly ignored the aforementioned contracts between it and this complainant. That service of process in said suit was secured upon one of the directors of the complainant company, although this complainant has never been domesticated in the State of New York and has never appointed any Agent in said State of New York to receive service of process. That in view of the nature of the action, together with the contested jurisdiction of the court, this complainant did not enter its general appearance nor submit to the jurisdiction of the court but raised therein solely the question as to whether said complainant was subject to service in the Courts of New

12 York. That as a result thereof judgment was rendered against this complainant on June 28, 1916, for $396.41 damages and costs, from which said judgment an appeal has been prosecuted to the Appellate Term of the Supreme Court of the State of New York, which appeal is now pending.

8. That subsequent thereto four additional suits have been instituted by the defendant herein and against this complainant in the same court for the tolls for the succeeding months. That each of said suits is essentially the same as the first suit above mentioned, except that it seeks to recover for services during different periods of time. That the complainant has, up to the present time, made no contest in any or either of the last mentioned foregoing suits. That this defendant threatens to institute an additional suit each and every month for the tolls for the previous month, and has signified its intention to continue to harass and annoy this complainant by bringing suit each month.

9. This complainant is informed and believes, and charges the fact to be, that the said defendant intends and threatens to bring additional suits each and every month for the tolls for the previous month, and has signified its intention to continue to harass and annoy this complainant by bringing such suits.

10. Forasmuch, Therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays as follows:

(a) That your Honors may grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court directed to the said Postal Telegraph-Cable Company, which is made a party defendant hereto, commanding it, on a day certain therein to be named, and under certain penalties, to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) the premises, and to stand to and abide by such order, direction and decree

13 as may be made against them or any of them, in the premises and as shall seem to your Honors to be meet and agreeable to equity and good conscience.

(b) That said contracts of December 26, 1888, and February 5, 1902, made by and between said defendant and said predecessor companies of this complainant, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway Company, be by this Honorable Court declared to be valid and subsisting contracts, binding upon said defendant and enforceable against it.

(c) That said suits at law now pending in the Municipal Court of the City of New York, and in the Appellate Division of the Supreme Court of New York between said defendant and this complainant be stayed during the pendency of this proceeding, that said defendants be also restrained and enjoined during the pendency of this proceeding by the order of this Court from bringing further suits against this complainant arising in or from the collection of telegraph tolls, that said defendant be forever enjoined and restrained by the order and decree of this Court from further prosecuting said suits, and also be forever restrained and enjoined from bringing any action of any kind against this complainant arising in or from the collection of telegraph tolls, except such as may arise from or under the said contracts, Exhibits "A" and "B."

(d) That a mandatory injunction may forthwith be entered herein requiring the said defendant to continue to furnish to the complainant, its officers, agents and employes, the telegraphic service provided for in said contracts attached hereto and marked Exhibits "A" and "B."

(e) That your orator may have such other and further relief in the premises as the nature of the case may require and to your Honors shall seem meet.

14 May it please your Honors to grant unto your orator the writ of injunction issued out of and under the seal of this Honorable Court, restraining and enjoining the said defendants, its officers, agents and employes, and all other persons or corporations whomsoever, as hereinabove prayed.

CHICAGO GREAT WESTERN RAILROAD COMPANY,

By SAMUEL M. FELTON,
Its President.

JOHN BARTON PAYNE and
RALPH M. SHAW,
Solicitors for Complainant.

15 State of Illinois, } ss.
County of Cook. }

Samuel M. Felton makes oath and says that he is President of Chicago Great Western Railroad Company, complainant in the foregoing bill; that he has read said bill and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to the matters and things therein stated to be alleged upon information

and belief, and as to those matters he believes it to be true.

SAMUEL M. FELTON.

Subscribed and sworn to before me this 8th day of November, A. D. 1916.

B. M. JENSEN,
Notary Public.

(Seal)

16 EXHIBIT No.

Interstate Commerce Commission

Washington, March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

(Endorsed) Filed Nov. 10, 1916, T. C. MacMillan, Clerk.

17 And afterwards to-wit: on the eighteenth day of November, 1916, came the defendant in said entitled cause by its solicitor and filed in the clerk's office of said court, its certain Answer to the amended bill of complaint. Said Answer is in the words and figures following to-wit:

18 ANSWER TO AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Complainant,* —*against*— Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity No. 735 Answer to Amended Bill of Complaint.

The defendant answering the amended bill of complaint herein alleges as follows:

I: Defendant alleges as a defense and point of law arising upon the face of the bill that there is an insufficiency of fact to constitute a valid cause of action in equity.

II: That defendant denies the allegations in "6" of the complaint that a telegraph right of way on a railroad right of way is highly essential for a telegraph company, and that the value of the service which the complainant renders the defendant under the contract attached to the amended bill of complaint cannot be measured in terms of money, and that to change the rate of compensation which complainant receives from the defendant under said contract substantially destroys and impairs the whole agreement, and that the compensation which the defendant is required by said contract to pay to complainant for services which the defendant is required to furnish thereunder may not be calculated in terms of dollars and cents, and that the service rendered by defend-

ant to complainant under said contract is part of the
19 measure of value of the right of way and other cross-considerations rendered by complainant to defendant, and that the provisions of the contract as specified in the amended bill of complaint create a situation that would make it impossible or highly unjust to operate complainant's railroad unless the contract is observed, or unless other telegraph lines are constructed, and that any breach of contract by defendant in not carrying out its obligations to furnish the service called for by the contract cannot be measured or accurately determined. Further answering the amended

bill of complaint, defendant denies that the Act of Congress of June 18th, 1910, amending Section 1 of the Act to Regulate Commerce rendered lawful, and that it still is lawful for railroad and telegraph companies to issue to each other franks and passes by means whereof the officers, agents and employees of telegraph companies and their families may ride upon the passenger trains of common carriers without paying the published rates for such transportation, and, on the other hand, the officers, agents and employees of common carriers by railroad engaged in interstate commerce lawfully may send messages, either upon the business of said railroad or their own private business, over the lines of telegraph companies without paying the charges provided for in the published tariffs of said telegraph companies.

III: That defendant denies the allegations in "8" and "9" of the amended bill of complaint that the purpose of defendant in instituting suits in New York City against this complainant for telegraph tolls has been or is to harass and annoy the complainant. Defendant alleges that it has repeatedly requested complainant to set up in defense of such suits in New York City the contracts which form the basis of this suit in order that the validity of the order of the Interstate Commerce Commission of March 28th, 1916, referred to in the amended bill of complaint herein might be determined in an orderly way, but that complainant has refused and still refuses to defend against such suits in New York City on that ground, and, on the other hand, refuses to comply with said order of the Interstate Commerce Commission of March 28, 1916. Defendant alleges that it is willing to test the validity of said order of March 28th, 1916, of said Interstate Commerce Commission, in this or any other suit and has endeavored to have such test suit or suits instituted and vigorously prosecuted.

IV: Further answering the amended bill of complaint herein and as a separate defense thereto, defendant alleges that both the complainant and defendant are subject to the Interstate Commerce Act and that the railroads owned or operated by complainant are post-roads within the meaning of S. 3964 of the Revised Statutes of the United States, and that the defendant has duly accepted the Post Road Act of Congress of July 24, 1866, and the Acts amendatory thereof or supplemental thereto, such acceptance having been filed with the Postmaster-General of the United States prior to the commencement of this suit in accordance with the terms of said Act.

That in the year 1914 the telegraphing done by defendant for complainant under the contracts referred to in the amended bill of complaint amounted to Seven thousand
21 nine hundred eighty-five dollars and thirteen cents, ($7,985.13), at regular public telegraph rates, and during said year the railroad transportation of men by complainant for defendant under said contracts amounted to Two thousand eight hundred forty-four dollars and twelve cents ($2,844.12), at regular public rates, and upon information and belief the transportation of material by complainant for defendant in said year amounted to not more than Twelve hundred dollars ($1200.) at regular public rates. That in the year 1915 the telegraphing done by defendant for complainant under the contracts referred to in and amended bill of complaint amounted to nine thousand one hundred dollars and four cents ($9,100.04), at regular public telegraph rates, and during said year the railroad transportation of men by complainant for defendant under said contracts amounted to Two thousand four hundred eight dollars and forty-six cents ($2,480.46) at regular public rates, and upon information and belief the transportation of material by complainant for defendant in said year amounted to not more than twelve hundred dollars ($1200) at regular public rates. That attached hereto and made a part hereof and marked Exhibits 1, 2, 3 and 4, respectively, are the ruling of the Interstate Commerce Commission of December 21, 1906, June 3, 1907, June 30, 1908, and March 28, 1916, the said ruling of March 28, 1916, being the ruling referred to in the amended bill of complaint herein as "Exhibit C" attached to said amended bill. That prior to the 20th day of May, 1909, receivers were appointed by this court of the property and assets of the Chicago Great Western Railroad Company, referred to in the amended bill of complaint herein, that company having become in-
22 solvent, said receivers having been appointed in the suit of John A. Humbird, et al., complainant, against Chicago Great Western Railroad Company, defendant, and on said 20th day of May, 1909, or thereabouts, this defendant presented a petition to this court sitting in Chancery, asking the court to direct said receivers to refund to this defendant Thirty-two dollars ($32) which said receivers had compelled this defendant to pay for the transportation of this defendant's linemen, in connection with certain repair work which said linemen were about to do for this defendant on this defendant's telegraph lines, not on and along the railroads

in charge of said receivers. That thereupon said petition was referred by this Court sitting in Chancery to A. R. Moore, a special Master, to investigate and report, and that on or about March 16th, 1910, said Special Master did report to this Court sitting in Chancery that this defendant was not entitled to any such relief as it sought and prayed for. That thereafter on March 16th, 1910, said Special Master overruled the exceptions by this defendant to the said report, and thereafter on May 4th, 1910, this court by its Circuit Court Judge, the Hon. Christian C. Kohlsaat, entered an order overruling said exceptions and approving said Master's Report and sustaining the demurrer of the Receivers to the petition of this defendant and dismissing the petition at this defendant's cost. This defendant alleges that the contracts involved in said petition by this defendant are the same contracts, copies of which are attached to the amended bill of complaint herein. Defendant further alleges that thereafter and until the passage of the Act of Congress of June 18th, 1910, said Receivers and this complainant as successors, of the railroads, property and rights of said Receivers, refused
23 to comply with said contracts so far as the transportation of the men and materials of this defendant was concerned when for use off from the lines of railroad of this complainant. Defendant further alleges that said decision of this court and said facts are a bar to the suit by equitable estoppel, res judicata and stare decisis and the principles of law pertaining thereto.

V: Further answering the amended bill of complaint herein and as a separate defense thereto, defendant alleges upon information and belief that the rates, fares and charges upon which telegraph men and material of defendant are transported by the complainant, have not been filed and published in accordance with the provisions of the Interstate Commerce Act and particularly of Section 6 thereof. Defendant further alleges that a telegraph line for railroad purposes is necessary to and along every railroad, and if the railroad did not contract with some telegraph company to bear a part of the expense of constructing and maintaining such telegraph line the railroad itself would have to bear the entire expense, including transportation of linemen and telegraph material, without income therefrom to the railroad company. That prior to the making of the contracts referred to in the amended bill of complaint herein, the complainant's predecessor in title had actually constructed and maintained

the telegraph lines involved in said contracts, and said railroad company had to bear the entire expense of construction and maintenance prior to the making of said contracts, including the transportation of linemen and telegraph material without any compensation therefor to the railroad
24 company. Defendant alleges that as to transportation by the complainant of telegraph men and material for use along the line of the railroad of complainant, said rates, fares and charges were not required to be filed.

Wherefore, this defendant demands judgment that the complaint herein be dismissed with costs.

Solicitor for defendant,
111 West Washington St.,
Chicago, Ill.

State of New York, }
County of New York. } ss:

Richard Reynolds, being duly sworn, deposes and says that he is Vice President of the Postal Telegraph-Cable Company, the defendant above named, which company is a corporation created under the laws of the State of New York, and that the foregoing answer to amended bill of complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that the defendant is such corporation; that this deponent is an officer of the same, to-wit, its Vice President, and is acquainted with the facts.

(Signed) EDWARD REYNOLDS.

Sworn to before me this 1st day of November, 1916.

(Signed) RICHARD T. THOMPSON,
(Seal) *Notary Public, Kings County No.* 22.

Certificate filed in New York County No. 46.

25 EXHIBIT NO. 1.

In The Matter Of Railroad-Telegraph Companies.

Petition of Western Union and Postal Telegraph Companies.
Decided December 21, 1906.

As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a "railway system," may lawfully contract to furnish free or reduced-rate transportation to a telegraph company for such of its officers, men, materials, and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced-rate transportation is not affected by the fact that the telegraph company may also use such telegraph lines in connection with its telegraph service to the public.

But such a railroad company or system of roads can not lawfully contract in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way, to furnish free or reduced-rate transportation for the officials, employees, laborers, materials or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads and upon the line or lines of another carrier or system.

Previous rulings of the Commission in relation to "Payment" for transportation" and "Issuance and use of free passes," so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed.

Report and Opinion of the Commission.

26 By the Commission.

On September 15, 1906 the Commission formally announced in a general tariff circular the following administrative ruling:

Payment for transportation: Nothing but money can be lawfully received or accepted in payment for transportation subject to the act whether for passengers or property, or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property or other payment, in lieu of the amount of money specified in the published schedules.

On October 12, 1906, the Commission announced an administrative ruling as follows: Exh

Issuance and use of free passes. The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc. are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing the duty imposed upon the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interests of, a carrier by which he is employed.

Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material; supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

In making the above ruling of October 12 the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain pur-
27 poses, apply, inter alia, to materials, supplies and men required under contracts between railroads and telegraph companies for the construction, maintenance, and operation of telegraph lines upon and along the rights of way of such railroad companies and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own right of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by the carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their

No. 1. own right of way, in the performance by such companies of a telegraph service for the public.

On November 9 the Commission heard the arguments of counsel for the Western Union and Postal Telegraph Companies in support of their petition, filed with the Commission, for a modification of the above rulings so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, in consideration of the free telegraph service accorded by the petitioners over wires of the lines of the respective contracting railroad companies, the latter agree to furnish free or reduced-rate transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers, and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

28 After a careful consideration of the oral arguments of counsel and of the printed and typewritten briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interests adversely. Nevertheless, the Commission knows of no provision or law now in force that vests it with any authority or any clause in the law that affords it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, make agreements with shippers, tracing the freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its offi-

cers, men, materials, or supplies destined for use in the tele- Exhi
graph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or a group of separately incorporated roads generally recognized as a "railway system"; and that, in consideration of the construction, maintenance, and operation of a tele-
29 graph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines.

Except as the rulings of the commission are herein explained and applied, the petition of the telegraph companies is denied.

No. 2. 30 EXHIBIT NO. 2.

Transportation of Men or Property for Telegraph Companies. (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by the use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operating of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service.

31 EXHIBIT NO. 3. Exhi

Ruling of Interstate Commerce Commission of June 30th, 1908.

Notice as to the issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1: Officers or employees of news companies other than newsboys.

2: Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad * * *

No. 4. 32

EXHIBIT NO. 4

Interstate Commerce Commission

Washington,

March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

(Endorsed) Filed Nov. 18, 1916, T. C. MacMillan, Clerk.

33 And afterwards, to-wit: on the eleventh day of January, 1917, came the complainant in said entitled cause by its solicitors, and by leave of court first had and obtained, filed in the clerk's office of said Court, its certain Amendment to its Amended Bill of Complaint in words and figures following to-wit:

34 AMENDMENT TO AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Complainant,* *vs.* The Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity No. 735.

To the Honorable, the Judges of the District Court of the United States, in and for the Northern District of Illinois.

Chicago Great Western Railroad Company, a corporation, by leave of Court first had and obtained, files this, its amendment to its Amended Bill of Complaint heretofore filed herein against The Postal Telegraph-Cable Company, a corporation, by amending Paragraph 5 of said Amended Bill of Complaint to read as follows:

5. That this Complainant, Chicago Great Western Railroad Company, is the successor of Chicago Great Western Railway Company, and the Chicago, St. Paul and Kansas City Railway Company, and has assumed all of the rights, duties, and liabilities arising under the aforementioned agreements, Exhibits A and B; that this Complainant has, ever since it succeeded to the rights, duties, and liabilities of its predecessor companies, been and now is fully complying with all the covenants of said agreements, exhibits A and B; and that this Complainant has at all times fully and faithfully observed, kept, performed all the obligations and requirements under said contracts on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money
35 in furnishing facilities to the defendant and has permitted the defendant to make use of and enjoy for its poles and lines the right-of-way of this Complainant which is of a value of many thousands of dollars, and the defendant has at all times availed itself of the facilities thus afforded

by this Complainant without complaint on its part that this Complainant was in any respect delinquent in failing to render to the defendant all of the services and benefits it was entitled to receive and enjoy under each and every of the provisions of said contracts; and this Complainant now stands ready and is able and willing and hereby tenders performance and continued performance to the Defendant of each and every of the provisions thereof and of all the conditions and obligations imposed upon this Complainant thereby, and alleges that upon such performance on its part it is entitled to require from the Defendant the performance of all the provisions of said contracts thereby required to be performed on the part of the Defendant.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
By

(Signed) S. M. FELTON
Its President.

(Signed) JOHN BARTON PAYNE and RALPH M. SHAW
Solicitors for Complainant.

State of Illinois }
County of Cook. } ss

Samuel M. Felton, makes oath and says that he is the President of the Chicago Great Western Railroad Company, complainant herein; that he had read the foregoing amendment to the Amended Bill of Complaint heretofore filed herein and that the allegations therein contained are true of his own knowledge except as to the matters and things therein alleged to be on information and belief and as to those matters he believes it to be true.

(Signed) SAMUEL M. FELTON

Subscribed and Sworn to before me this 30th day of December, A. D. 1916.

(Signed) B. M. JENSEN
(Seal) *Notary Public.*

(Endorsed) Filed Jan. 11, 1917, T. C. MacMillan, Clerk.

36 And on to-wit: the eleventh day of January, 1917, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph-Cable Company, a corporation.
735.

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It is hereby ordered, adjudged and decreed that leave be granted to the complainant herein to file instanter its amendment to the amended bill of complaint heretofore filed and that the answer of the defendant heretofore filed to the amended bill of complaint stand as the answer to the amendment to the amended bill of complaint.

37 And afterwards to-wit: on the twelfth day of January, 1917, came the complainant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain Reply to the Answer of the defendant to the Amended Bill of Complaint. Said Reply is in words and figures following to-wit:

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38 REPLY OF THE COMPLAINANT TO THE ANSWER OF THE DEFENDANT TO THE AMENDED BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company.
In Equity No. 735.

Reply of the Complainant to the Answer of the Defendant to the Amended Bill of Complaint.

Now comes the complainant by its solicitors, and for reply to the matters and things set forth in the "Answer of the Defendant to the Amended Bill of Complaint" says:

1. That it denies the averments in Paragraph 1 of said Answer.

2. The complainant denies the statements set forth in

Paragraph 3 of the defendant's answer, alleging that defendant repeatedly requested complainant to set up in defense of the suits in New York City the contracts which form the basis of this suit, but complainant admits that it refused to set up as an affirmative defense said contracts. The complainant further admits that it has refused to plead to the merits in sundry actions against it by the defendant in the courts of the State of New York. The complainant asserts that it is not subject to the service of process in the courts of the State of New York or to the jurisdiction thereof.

3. The complainant admits that both it and the defendant are subject to the jurisdiction of the Interstate Commerce Act. The complainant avers that as to whether or not the defendant is a post road and as to whether or not it has duly accepted the Post Road Act of Congress the complainant is not advised, but the complainant demands strict proof thereof if it becomes material on the hearing of this cause. The complainant denies that the figures set forth in Paragraph 4 of the defendant's answer as representing the aggregate amounts of the telegraphic service furnished by the defendant to the complainant in the years 1914 and 1915,
39 measured at the regular tariff rates of the defendant, are correct; and denies that the figures set forth in Paragraph 4 of the defendant's answer as representing the aggregate amounts of the transportation service furnished by the complainant to the defendant in the years 1914 and 1915, measured at the regular tariff rates of the complainant, are correct. The complainant avers that even if said statements be true they are immaterial and irrelevant to the controversy presented in this proceeding.

The complainant admits that the rulings of the Interstate Commerce Commission attached to the said defendant's answer and referred to in Paragraph 4 were made at the time or times they are said to have been made by the Interstate Commerce Commission; and the complainant avers that many other rulings touching upon the same subject have been made by the Interstate Commerce Commission upon this subject matter, to all of which the complainant refers and begs leave to present in evidence if upon the hearing of this case they should be material thereto.

The complainant denies the averments in said answer touching the appointment of a receiver or receivers for the complainant, and complainant asserts that no receiver was

ever appointed or was ever in possession of the property of this complainant.

Further answering this complainant avers that after the passage of the Act of Congress of June 18, 1910, amending the Interstate Commerce Act and up to and including the date of the institution of the first of the suits referred to in the bill of complaint heretofore filed herein by the complainant, both the complainant and defendant have conducted their business relations each with the other pursuant to and in conformity with the contract set up in said bill of complaint between said complainant and the defendant; and have in all respects ratified and adopted the same.

40 4. Further answering this complainant avers that under the contract between it and the defendant, it is unnecessary for this complainant to file any tariffs and schedules with respect to the transportation of the property which it is required under the contract aforesaid to transport for the defendant.

Further answering this complainant denies that it has failed to file its tariffs with respect to the transportation of property of telegraph companies other than the defendant over the lines of the complainant.

Further responding this complainant prays the same advantage of this, its reply, as if it had moved to strike out each and every of the averments containing new matter contained in the said defendant's answer.

Wherefore the complainant says that it is entitled to receive and prays that it may receive the relief asked for in its amended bill of complaint.

(Signed) JOHN BARTON PAYNE
(Signed) RALPH M. SHAW
Solicitors for complainant.
Chicago Great Western Railroad Co.

(Endorsed) Filed Jan., 12, 1917, T. C. MacMillan, Clerk.

41 And on to-wit: the ninth day of February, 1917, in the record of proceedings in said entitled cause before the Hon. A. B. Anderson, District Judge, appears the following entry to-wit:

1917. Chicago Great Western Railway Company
vs.
Postal Telegraph-Cable Company. } 735.

Upon motion of the respective parties hereto, it is ordered by the court that the above entitled cause be and the same is reset for hearing on February 27, before Judge Evans.

1917. 42 And on to-wit: the twenty-fourth day of May, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company,
vs.
Postal Telegraph-Cable Company. } 735.

Now come the parties by their respective solicitors and now this cause comes on for trial. Thereupon evidence on behalf of the respective parties is heard and concluded. Upon motion, leave is hereby granted the defendant to amend on its face its answer to amended bill by changing name of the Chicago Great Western Railroad Company, to Chicago Great Western Railway Company in lines twenty-one and thirty on page four.

It is ordered by the Court that plaintiff file its brief in fifteen days, the defendant have ten days thereafter and plaintiff to have ten days in which to file reply brief.

67 And on to-wit: the twelfth day of October, 1917, there was filed in the clerk's office of said court in said entitled cause, a certain Certificate of Evidence, in words and figures following to-wit:

CERTIFICATE OF EVIDENCE.

United States of America,
Northern District of Illinois, } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Chicago Great Western Railroad Company, a corporation,
Complainant.
vs.
Postal Telegraph Cable Company, a corporation,
Defendant.
} In Equity, No. 735.

Certificate of Evidence.

Be It Remembered that heretofore, to-wit, on the 17th day of May, A. D. 1917, this cause came on for hearing before the Honorable Evan A. Evans, sitting as a District Judge, on the Equity side thereof, upon the pleadings heretofore filed herein.

Present:
Messrs. Winston, Payne, Strawn & Shaw, by Mr. George A. Kelly, appearing for complainant.
Mr. Jacob E. Dittus, appearing for defendant.

68 Whereupon the complainant to maintain the issues upon its part, introduced the following evidence, to-wit:

Mr. Kelly: Now Mr. Dittus.

(Mr. Kelly and Mr. Dittus conferred together out of the hearing of the reporter.)

Mr. Kelly: I have here, if the court please, certified copies of the various suits which were instituted by the defendant against the complainant in New York, but in view of the turn which has now been taken in this litigation, Mr. Dittus does not believe, and I do not believe it is necessary to offer those in evidence, as that question is out of the case at this time.

The Court: Take this down, Mr. Reporter.

In view of the fact that there is no conflict in reference to the threatened litigation, or necessary facts to give the court of equity jurisdiction, I will not require the complainant to introduce proof which would be necessary to maintain its

of filed 1917. case in order to grant an injunction, but I will assume that the case is to be determined upon the rights under the contracts, if any there are.

69 Mr. Kelly: Yes.

Mr. Dittus: Yes.

The Court: That will save the taking of certain testimony

Mr. Kelly: Yes.

The Court: And, Mr. Reporter, take this further: The defendant does not insist upon any testimony upon that issue.

Mr. Kelly: I also desire, if the court please, to offer in evidence at this time, certain Conference Rulings of the Interstate Commerce Commission, certain excerpts from the 21st and 22nd annual reports of the Interstate Commerce Commission to Congress, all bearing on the question at issue in this case. I have furnished Mr. Dittus with a memorandum of these Conference Rulings, and I understand that there is no objection to their being received in evidence.

Mr. Dittus: With the understanding—

The Court: Just mark them, have the reporter mark them Exhibit No. 1. (Papers so marked by the reporter.)

Mr. Dittus: With the understanding that I have the same right to introduce any other Conference Rulings I may think material, I will have no objection.

Mr. Kelly: Yes.

The Court: It will be received with that understanding.

(Said Conference Rulings being marked Complainant's Exhibit 1, so offered and received in evidence, as aforesaid, and the same is in the words and figures following, to-wit.)

70 CONFERENCE RULING 27—SEPTEMBER 15, 1906.

207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules.

CONFERENCE RULING NO. 208, OCTOBER 12, 1906. (Paragraph c)

208. Free Passes and Free Transportation. * * *

(c) Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

CONFERENCE RULING 219. JUNE 3, 1907.

219. Transportation of Men or Property for Telegraph Companies.—(a) In its decision on the petition of the Western Union and Postal Telegraph companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (See Rulings 95-a, par. 2, and 161; see also amendatory act of June 18, 1910, interpreted in Ruling 305).

(b) This definitely differentiates between the employes of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railroad, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any lines of railway which such officials represent nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as part of the operating facilities of such railways. Practically all

71

telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service.

Paragraph (c) of Conference Ruling 219—Nov. 15, 1907.

(c) This rule applies also to telephone service, and carriers that have not already done so are hereby requested and called upon to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (See Ruling 305).

CONFERENCE RULING 305—MARCH 31, 1911.

305. Application of the Amended Act to Telegraph and Telephone Companies. * * *

(d) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section.

CONFERENCE RULING 364—JUNE 8, 1912.

364. Exchange of Services by Telegraph and Railroad Companies. Under the amendatory act of June 18, 1910, it is provided "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry, Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.

72 RULING OF THE COMMISSION DECEMBER, 1906, "IN THE MATTER OF RAILROAD TELEGRAPH COMPANIES" (INTERSTATE COMMERCE REPORTS, VOL. 12, P. 12).

Exhi Co rul

"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making agreements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'railway system'; and that, in consideration of the construction, maintenance and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines." (Interstate Commerce Reports, Vol. XII, pp. 12-13.) (Italics ours.)

73 21ST ANNUAL REPORT INTERSTATE COMMERCE COMMISSION.

(p. 25)

"On November 9, 1906, the Commission heard arguments of counsel for the Western Union and Postal Telegraph companies in support of their petition for a modification of the rulings of the Commission in regard to payment for transportation and issuance and use of free passes so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, and in consideration of the free telegraph service accorded by the petitioners over wires off the lines of the respective contracting railroad companies, the latter agreed to furnish free or reduced-rate transportation to such telegraph companies for the men, material, and supplies necessary in connection with the construction, operation, and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of

railroads are sui generis and unlike any other contracts with carriers that have come to its attention. So far as the Commission could see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making arrangements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, frequently find it convenient to telegraph beyond their own right of way and are allowed by telegraph companies to do so free or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.

"The Commission held that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'Railway system;' and that, in consideration of the construction, maintenance, and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced rate transportation for such officers, men, materials, and supplies of such telegraph companies as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

74 "But the Commission also held that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced rate carriage and transportation to officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the line or system of lines of any other

carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In its opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines."

75 22D ANNUAL REPORT OF INTERSTATE COMMERCE COMMISSION 1908. (PAGE 129)

Points decided in formal proceedings since the Hepburn Act.

"In the matter of railroad-telegraph contracts. (12 I. C. C. Rep. 10)

1. As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a 'railway system,' may lawfully contract to furnish free or reduced rate transportation to a telegraph company for such of its officers, men, materials and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced rate transportation is not affected by the fact that the telegraph company may also use such telegraph line in connection with its telegraph service to the public.

2. But such a railroad company or system of roads cannot lawfully contract, in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way, to furnish free or reduced rate transportation for the officials, employees, laborers, materials, or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads, and upon the line or lines of another carrier or system.

3. Previous rulings of the Commission in relation to 'Payment for transportation' and 'Issuance and use of free passes,' so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed."

76 CONFERENCE RULING OF JULY 15, 1914, PROMULGATED MARCH 28, 1916.

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

77 Mr. Kelly: I endeavored to cull out all Conference Rulings of the Commission bearing on this question, on both sides of it, that has been my endeavor in getting up that memorandum. If there is any I have not included, I am perfectly willing to have them offered.

Now, I think that is all I wish to offer on behalf of the complainant at this time. I do not think that it is necessary to offer any proof as to the allegation about our right-of-way being highly essential and desirable to a Telegraph Company. I will close at this point. I will have some evidence in rebuttal on the question of res adjudicata, probably.

The Court: Let the record show the complainant rests.

Whereupon the complainant rested its case.

And thereupon the defendant to maintain the issues on its part, offered the following evidence, to-wit:

Mr. Dittus: Now, if the court please, on behalf of the defendant, I desire to offer the certificate of the Post Master

General, certifying that the defendant, Postal Telegraph Cable Company, has accepted all the restrictions and obligations required by law.

The Court: Please have it marked by the reporter so
78 we will know what we are referring to.

Mr. Dittus: Yes, please mark it Defendant's Exhibit 1.

(Said document was thereupon marked by the reporter as "Defendant's Exhibit 1.")

The Court: Is there any objection to the offer of "Defendant's Exhibit 1."?

Mr. Kelly: Yes. I desire to interpose an objection, on the ground that it is incompetent, irrelevant and immaterial, if the court please.

The Court: The objection will be overruled. The exhibit, Defendant's Exhibit Number 1 is received in evidence.

(Whereupon said certificate, last above referred to, was marked by the reporter as "Defendant's Exhibit No. 1" and being offered and received in evidence over the objection of the complainant, and the same is in the words and figures following, to-wit:

79 DEFT'S EXHIBIT I.

Post Office Department.

Washington, D. C. May 5, 1897.

I, Jas. A. Gary, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In Testimony Whereof, I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

JAS. A. GARY,
Postmaster General.
B. W. T.

80 This Is To Certify that the Postal Telegraph-Cable Company, a corporation duly organized under the laws of the State of New York, for the purpose of constructing, maintaining and operating lines of telegraph throughout the United States, has, by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5,268 of the Revised Statutes of the United States, all the restrictions and obligations re-

quired by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations. Defe Ex

In Witness Whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by the President and attested by its Secretary at the City of New York, this seventeenth day of March, eighteen hundred and eighty-six

POSTAL TELEGRAPH-CABLE COMPANY,
by JAMES H. WITHINGTON,
President.

(Postal Telegraph-Cable Co.)
(Incorporated)
(1886.)

Attest:
J. O. STEVENS,
Secretary.

81 Mr. Dittus: I also offer in evidence a transcript of the record, in the case of John A. Humbird, et al. vs. Chicago Great Western Railroad Company, No. 28934, in the Circuit Court of the United States, relating to the intervening petition of the Postal Telegraph Cable Company, in that suit.

The Court: Mark it Defendant's Exhibit No. 2.

(Said document was thereupon marked by the reporter, Defendant's Exhibit No. 2.)

Mr. Dittus: I understand that counsel agrees that this is a correct copy of the record, and may be introduced in lieu of the original record.

Mr. Kelly: Yes.

The Court: Any objections?

Mr. Kelly: Yes, we object, on the ground that that is immaterial, irrelevant and incompetent.

The Court: Defendant's Exhibit No. 2 is received in evidence.

(Which said transcript of record, last above referred to, marked by the reporter "Defendant's Exhibit No. 2," being so offered and received in evidence over the objection of the complainant, and the same is in the words and figures following to-wit:

82 John A. Humbird, *et al.*
vs.
Chicago Great Western Railway Company } 28934.

Pleas in the Circuit Court of the United States Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the fourth day of May, 1910, being one of the days of the December Term of said Court, begun Monday, the twentieth day thereof, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States of America, the one hundred and thirty-fourth year.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, Presiding.
Luman T. Hoy, United States Marshal for said District and
H. S. Stoddard, Clerk of said Court.

83 In the Circuit Court of the United States

Northern District of Illinois,

Eastern Division.

John A. Humbird, George T. Meyer, Walter Cunliffe Alexander F. Wallace, Edwin Waterhouse and Edward P. Tennant,
vs.
Chicago Great Western Railway Company. } 28934.

Be It Remembered That heretofore, to-wit, on the twenty-third day of January, 1908, in the record of proceedings thereof in the above entitled cause, appears before the Honorable Christian C. Kohlsaat, Circuit Judge, the following entry to-wit:

Def. E

John A. Humbird, George T. Meyer, Walter Cunliffe, Alexander F. Wallace, Edwin Waterhouse and Edward P. Tennant,
vs.
Chicago Great Western Railway Company.

Ordered, That Albert R. Moore, of St. Paul, Minnesota, be and he is hereby appointed Special Master in Chancery, in this cause, to whom shall be referred, as of course, all matters arising in the progress of this cause, which by the rules and practice of this Court, or by the general or special orders of the Court, are required or proper to be referred to a
84 Master in Chancery; said Albert R. Moore, being the Special Master heretofore appointed in that certain cause pending in the Circuit Court of the United States for the district of Minnesota, the court of primary jurisdiction in said cause, wherein John A. Humbird, et al., are plaintiffs, and Chicago Great Western Railway Company is defendant, and in which said cause Alpheus B. Stickney and Chas. H. F. Smith, the receivers herein, were originally appointed receivers.

The Special Master is hereby authorized to establish and maintain his office at the city of St. Paul, in the state of Minnesota, the headquarters of the said receivers appointed in this cause, their principal accounting and operating offices as such receivers being situated at said city of St. Paul, in the state aforesaid, and may, in his discretion, hold a Master's Court at any point in this district he may designate, whenever he is satisfied that costs and expenses may be saved to the estate, or the convenience of the parties promoted by so doing, and shall hold court in this district whenever any witnesses residing in this district are to be examined & so desire.

Whenever the receivers in this cause shall file their reports in the office of the Master in this cause such Master, with the assistance of one or more competent accountants, whom he is authorized to select and employ, will proceed to examine said reports. For the purpose of making said examination the Master, when he deems it necessary may summon the receivers and any of their employes, and any other persons before

him, and examine them under oath touching any and all matters involved in said reports.

85 The Master, by himself and his accountants, is authorized to visit the office or offices of said receivers and their accounting offices, wherever kept, and as often as necessary, to examine all books, vouchers, papers and correspondence within his opinion may be necessary for a full and accurate understanding of the reports of said receivers, and said Master is authorized to demand from said receivers and their clerks, agents and accountants copies of all vouchers, papers and books which he may deem necessary to a full and complete examination of the reports of said receivers.

The Master will proceed with all convenient dispatch in the examination of said reports, and as soon as his examination of any report is completed, will prepare and file his report thereon, together with the report of the receivers, in the office of the clerk of this court.

The receivers shall make and file their reports in the Special Master's office at St. Paul, Minnesota, and shall include therein all matters of administration in the jurisdiction of other Courts.

And afterwards, to-wit, on the twentieth day of May, 1909, came the Postal Telegraph-Cable Company, by its solicitors and filed in the clerk's office of said court in said entitled cause, its certain Intervening Petition in words and figures following, to-wit:

86 United States of America,
Norther District of Illinois, } ss
Eastern Division.

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IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.
} In Equity.

To the Honorable Christian C. Kohlsaat, Judge of said Court, In Chancery Sitting:

Your petitioner, Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, complains of Charles H. F. Smith and Horace G. Burt, Receivers, of the Chicago Great Western Railway Company, and alleges as follows:

1. That your petitioner, the Postal Telegraph-Cable Company, is a corporation organized under the laws of the State of New York, having power and authority under its articles of incorporation to own, construct, use and maintain lines of electric telegraph within and also beyond the limits of the State of New York, and that the lines of telegraph owned and controlled and maintained by your petitioner extend into and through the several states of the Union and connect with ocean telegraph cables at the Atlantic and Pacific seaboards.

2. That the Chicago Great Western Railway Com-
87 pany is a corporation of the States of Illinois, Iowa and Minnesota, and that it is the successor in law to the Chicago, St. Paul and Kansas City Railway Company, a corporation of the State of Iowa, and lessee of the Mason City and Fort Dodge Railway Company, also a corporation of the State of Iowa.

3. That on the 21st day of December, 1888, an agreement was entered into by and between the Chicago, St. Paul and Kansas City Railway Company and your petitioner, a copy of which agreement is hereto attached as Exhibit "A" and

made a part of this petition to the same extent as though it had here been inserted in full.

4. That said contract recites that said railway Company owns and operates a railway extending from the City of Chicago to Minneapolis, via Dubuque, Oelwein and St. Paul, and from Oelwein, via Marshalltown and Desmoines, Iowa, to St. Joseph, Missouri, with various branches as in said agreement set forth, and that said Railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole of the said route, and that the said Telegraph Company owns and operates lines of telegraph reaching all cities of the United States north of and including St. Louis, Cincinnati, Washington City, and east of the Missouri River and, by its connections the principal cities and towns in British America and on the Pacific Coast, and, via the Commercial Cable Company all points in the Old World, and was engaged in extending its lines into the southern states.

5. That said agreement further recites that the Telegraph Company should take charge of the telegraph lines and property of the Railway Company on the 1st day of January, 1889, and it grants and assures the Telegraph Company the exclusive right of way on and along the line, lands and
88 branches of said Railway Company and on any extensions and branches thereof, for the construction and use of lines of poles and wires, with the right to put up and construct from time to time such additional wires or such additional lines of poles as the Telegraph Company may find necessary for its business. The Railway Company further agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines and for any extensions thereto that may hereafter be made upon the property that was then or might hereafter be owned or controlled by the Railway Company and to furnish office rooms in its railway stations.

6. That it was further provided under Section three (3) of said agreement that the Railway Company should transport, free of charge over its railway, on the application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company, when traveling upon the business of said company, and also to transport and distribute free of charge along the line of its railway, all poles and other material or supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by said agreement, and of such additional lines of poles and wires as might be erected under the provisions

of said agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties to said agreement at places along and adjacent to said railway. Defendant's Exhibit 2.

7. That the said Telegraph Company further agreed to take possession of telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials necessary for the maintenance and repair of said lines and of any extensions thereof that might thereafter be made, and all battery, instruments and apparatus necessary for operating the same, together with blank
89 forms and stationery necessary for the commercial telegraph business at all points along the line of said Railway at which a telegraph office was then or might thereafter be maintained;

8. That the Telegraph Company further agreed to pay to the Railway Company the sum of eighty seven thousand dollars ($87,000) in three equal payments of twenty nine thousand dollars ($29,000) on July 1, 1889, and on January 1, and July 1, 1890;

9. That the Telegraph Company agreed to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of ten dollars ($10) (subsequently, under contract dated November 5, 1902, between said Chicago Great Western Railway and your petitioner changed to twelve dollars ($12)) per mile per annum, including any extensions that might thereafter be made of said railway, said business being charged at the regular rates of the Telegraph Company, and for such purpose the Telegraph Company would issue to such officers of the Railway Company as might be designated by the President, Vice President or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said Railway; and in case the telegraph business of said Railway beyond its lines should amount to more than twelve dollars ($12) per mile of railway per annum, the excess should be paid for at one-half the regular rates of the Telegraph Company. It was understood, however, that such telegraph service applied only to the transmission of messages concerning business of the Railway Company, and should not be extended to messages for transmission by ocean cable, nor to messages ordering sleep-

ing car, parlor car, or steamer berths, or other accommo-
90 dations for customers of the Railway Company;

10. It was further provided that the business of the Railway Company should have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company should have the full use of all the wires then in operation and of two wires upon any extensions of said railway that might thereafter be made, in case the Railway Company required the same, free of charge;

11. That it was further provided that in case the Railway Company should require the use of additional wire or wires for railway business, over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires should be required for commercial business, the same shall be paid for by the Telegraph Company, and, in either case, such additional wire or wires should come in under the agreement as to maintenance, repairs and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, should at any time be unfit for use, the Railway Company should have the free use of such of the wires set apart for commercial business as might be necessary to transact its business until the wires set apart for it should be put in fit condition for use;

12. That it was further provided that the provisions of said agreement should be and continue in force for ninety nine (99) years from the date thereof.

13. Your petitioner further shows that under agreement dated the 26th day of December, 1903, by and between the Mason City and Fort Dodge Railway Company and your petitioner a contract substantially similar to the last mentioned contract was entered into between said railway company and your petitioner; to continue in force, however, for eighty four
(84) years from the date thereof, so as to expire at or
91 about the same time that the original contract between the Chicago Great Western Railway Company and petitioner expires, which contract is attached and made part hereof as Exhibit "B."

14. Your petitioner alleges that both said Railway Companies and your petitioner have each faithfully performed their respective duties and obligations undertaken by each of them under said several contracts until the filing of the bill of complaint herein and the appointment of said receivers by

this Honorable Court to take charge of and manage said Chicago Great Western Railway; Def Ex

15. That subsequently to the appointment of said receivers, the said receivers elected to abide by and perform said contracts with your petitioner, and have ever since their appointment as said receivers, adhered to and complied with the terms of said contracts, so far as the Chicago Great Western Railway was bound to comply with and perform said contracts and your petitioner has likewise rendered the same service and duties to the receivers that it was under said contract bound to render to and perform for the said Railway Company prior to the appointment of said receivers and that, by such action, the receivers have ratified and confirmed said contracts with your petitioner and the same are now in full force and effect and binding upon said receivers.

16. Your petitioner further shows that, under Section three (3) of said agreement of December 26, 1888 it is the duty of said Railway Company to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company when traveling upon the business of said Telegraph Company.

17. That by reason of a great sleet storm in the territory east of the City of Chicago, late in the month of Feb-
92 ruary, 1909, a considerable portion of your petitioner's telegraph wires and poles were broken and communication was interrupted between the east and the west; that in such instances which have occurred each year in the past your petitioner and the Western Union Telegraph Company and the telephone companies find it necessary to draft every available lineman from the territory not affected by atmospheric disturbances to the place or places where there is a general breaking down or destruction of the telegraph lines, in order to reconstruct and repair such lines in the shortest possible time; that the necessity for such reconstruction is always imperative and that the linemen and snupervising officers are required to and do work almost continuously until such repairs and reconstruction has been effected and communication has been re-established, your petitioner averring that it is not uncommon for men to work 24 and 36 hours continuously in such labors; and that the said breaking of your petitioner's wires and lines was so extensive that linemen were immediately drafted from the territory west of

Chicago, including linemen from Minneapolis and St. Paul in to the territory east of Chicago, and that upon the completion of said labors and reconstruction of the telegraph lines, said linemen were returned to their home stations.

18. That four (4) of such telegraph linemen after restoration of the lines, and on March 1, returned to the City of Chicago for the purpose of returning to their homes at Minneapolis and St. Paul, and your petitioner, in accordance with the terms of the contract between it and said receivers, applied to said receivers for free transportation for said four (4) linemen from Chicago to St. Paul; that said free transportation could not be obtained from the headquarters of said receivers at St. Paul, Minnesota, and to save the time of said four men, your petitioner purchased tickets for said four linemen over said receiver's railway from Chicago
93 to St. Paul, and paid therefor the regular rate of fare at eight dollars each, or thirty two dollars (32) for the total fares.

19. That subsequently thereto, your petitioner applied to said receivers for a refund of said thirty two dollars ($32) so paid by your petitioner for the fares of said linemen, upon the ground that your petitioner was entitled to free transportation for said linemen under Section three of your petitioner's contract aforesaid;

20. That in reply to your petitioner's demand said receivers declined to refund to your petitioner said sum of thirty two dollars ($32), alleging as a reason for such refusal that the men in question were engaged on your petitioner's lines east of Chicago; that they did not come to Chicago for the purpose of doing any work on the Chicago Great Western Railway right of way, nor were they returning to St. Paul for the purpose of doing any work upon said right of way, wherefore said receivers refused to refund said fares; said receivers justified their refusal to refund upon the ground that the Interstate Commerce Commission had ruled that free transportation under the Hepburn Act could not be given to telegraph employees notwithstanding the existence of a contract between a railway company and a telegraph company requiring the railway company to issue to the telegraph company free transportation to its employees under circumstances and facts similar to those hereinbefore stated by your petitioner.

21. Your petitioner alleges that the terms of the contract

between your petitioner and said Chicago Great Western Railway Company as adopted by said receivers, as hereinbefore set forth, requires the receivers to issue to your petitioner free transportation for its linemen and employees, whether said linemen are to be employed upon the right of way or are upon a journey with that purpose in view, or
94 are to be employed or have been employed by your petitioner's telegraph lines upon other railways or highways than said Chicago Great Western Railway's right of way, and that said contract does not, by its terms and was not intended in spirit, to limit said free transportation of employees to those only who were to render or were rendering service upon or in connection with the telegraph lines of your petitioner upon said Chicago Great Western Railway.

Defen Exh

22. Your petitioner alleges that under Section one of the Act approved June 29, 1906, known as the Hepburn Act, and intended to prevent discrimination by common carriers, railway companies are expressly authorized to issue free transportation to linemen of telegraph and telephone companies, and neither the spirit of said act nor the express words thereof indicate any intention to limit the carriers' right to issue such free transportation solely to such telegraph and telephone linemen as shall be or shall have been engaged in rendering service to the telegraph or telephone company upon the line of the railway company granting such free transportation.

23. Your petitioner upon advice of counsel alleges that, even if its claim to such free transportation shall be held not to be within the exceptions set forth in said Hepburn Act, yet its claims to free transportation of its employees is, under its said contract, protected by the Constitution of the United States, notwithstanding the terms of said Hepburn Act, and that said Act cannot rightfully be so construed as to impair the obligation of said contract and to discharge the Railway Company and its receivers from obligations and duties resting upon them to the injury, prejudice and great money loss annually of your petitioner during the life of said contract.

24. Your Petitioner therefore insists that it is entitled to a refund of said sum of thirty two dollars ($32) and it
95 prays that an order may be entered requiring said receivers to answer this petition upon a short day to be fixed by the court and that a hearing may be had upon any question

of fact which may be raised by this petition and said answer, and that, upon a hearing thereof, said receivers may be directed and ordered by this honorable court to refund to your petitioner the said sum of thirty two dollars ($32) so as aforesaid paid by it to said receivers for the transportation of its linemen from Chicago to St. Paul as aforesaid.

And your petitioner will ever pray, etc.

POSTAL TELEGRAPH CABLE COMPANY
Petitioner
By T. W. CARROLL
General Superintendent.

LOESCH SCOFIELD & LOESCH
Solicitors for Petitioner.
FRANK J. LOESCH
Of Counsel.

State of Illinois, } ss.
County of Cook. }

T. W. Carroll, being first duly sworn, says that he is the General Sup't. of the Postal Telegraph-Cable Company, the Petitioner in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true.

T. W. CARROLL

Subscribed and sworn to before me this 14th day of May, A. D. 1909.

ANNA W. PORTER
Notary Public.

(Seal)

96 EXHIBIT A.

This Agreement made and entered into this 26th day of December, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively:

Witnesseth:

That Whereas, the Railway Company owns and operates a railway extending from the City of Chicago, Illinois, to

Minneapolis, Minnesota, via Dubuque, Oelwein, Iowa, and St. Paul, Minnesota, and from Oelwein via Marshalltown and Des Moines, Iowa, to St. Joseph, Missouri, with branches from Dubuque Junction to Lyle, Minnesota, from Sumner to Hampton, and from Wilson Junction to Cedar Falls, Iowa, and contemplates extending its railway in the near future, by lease or otherwise, from St. Joseph to Kansas City, Mo., and whereas the Railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole route of said railway as above described, together with the necessary batteries, machinery, and apparatus necessary for operating the same;

Defend Exh

And Whereas the Telegraph Company owns and operates lines of telegraph reaching the principal cities in the United States north of and including St. Louis, Cincinnati, and Washington City, and east of the Missouri River, and by its connections, the principal cities and towns in British America and on to the Pacific Coast, and via the Commercial Cable Company to points in the Old World that are reached by
97 telegraph, and is engaged in extending its lines into the Southern States and is desirous of including within its system the lines of telegraph of the said Railway Company;

Now Therefore for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company may take charge of the telegraph lines and property of the Railway Company as hereinbefore described, on the first day of January, 1889, and that, so far as it legally may, it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line, lands and branches of the Railway Company, and on any extensions and branches thereof, for the construction and use of lines of poles and wires, and underground or other lines for commercial and public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound so to do, transport men or materials for the construction or operation of a line of poles or wires or underground,

or other lines in competition with the lines of the Tele-
98 graph Company, party hereto, except at and for the Rail-
way Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, provided always, that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company,
then the Telegraph Company shall furnish and pay for
99 its own operating service at such office. And it is agreed
that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer, of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business

of said Company, and also to transport and distribute free Defen Exh
of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all
100 materials necessary for the maintenance and repair of said lines, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now, or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees to pay to the Railway Company the sum of Eighty-seven thousand dollars ($87,000) in three equal payments of Twenty-nine thousand dollars, ($29,000) on the first of July 1889, the first of January, and the first of July 1890, respectively, for which sums it will give its promissory notes, with interest at the rate of five per cent per annum, upon the execution of this agreement.

VII. The Telegraph Company agrees to transmit free over its lines beyond said Railway telegraph lines, business of the Railway Company to the extent of $10.—per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to said of-
101 ficers of the Railway Company as may be designated by the President, Vice-President, or General Manager there-

of, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires, the Com-
102 mercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the term of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, shall be at any time unfit for use the Railway Company shall have the free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

IX. It is mutually understood and agreed, that the Railway Company is not to be responsible for, and the Telegraph

Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damages that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company; Nor for any loss,
103 damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said Railway; and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from, or on account of any error, delay, or default in the transmission or delivery of any message sent for the Railway Company under this agreement.

X. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries, and blank forms and stationery for local business, as hereinbefore provided.

XI. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XII. The provisions of this agreement shall be and continue in force for ninety-nine years from the date hereof, and in case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such differences shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and
104 the third by the two thus chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In Witness Whereof the parties hereto have caused the names of their respective Presidents to be hereto subscribed

and their corporate seals to be attested, the day and year first above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,
By A. B. STICKNEY,
President.

(Corporate Seal)
Attest:
JOHN I. THOMPSON,
Assistant Secretary.

POSTAL TELEGRAPH-CABLE COMPANY,
By F. B. CHANDLER,
President.

(Corporate Seal)
Attest:
I. O. STEVENS,
Asst. Secretary.

105 Memorandum of Agreement, made this—fifth—day of —February—1902, by and between the Chicago Great Western Railway, a corporation duly organized and existing under the laws of the State of ..... and the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York:

It is mutually agreed that the seventh clause (VII) of the agreement made and entered into December 26th, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, and the said Postal Telegraph-Cable Company (the Chicago Great Western Railway Company as successor of the Chicago, St. Paul and Kansas City Railway Company having assumed said agreement), shall be and the same hereby is cancelled and the following clause substituted therefor, in effect from this date:

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of Twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates, to the final destination, all such railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph

Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company originating at or destined to points on the Telegraph Company's line, within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, and the tolls upon which should properly be chargeable to such customers. Defe Ex

In Witness Whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

CHICAGO GREAT WESTERN RAILWAY
By SAML STICKNEY
General Manager.

(Corporate Seal)
Attest:
R. C. WRIGHT,
Secy.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER,
Vice-President.

(Corporate Seal)
Attest:
CHAS. P. BRUSH,
Asst. Secretary.

106 EXHIBIT B.

This Agreement, Made and entered into this 26th day of December, 1903, by and between the Mason City & Fort Dodge Railway Company, a corporation organized under the laws of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company, respectively.

Witnesseth:

That Whereas, The Railway Company owns and operates a railway extending from the City of Oelwein, Iowa, to Waverly, Iowa, and

Whereas, The Railway Company is desirous of obtaining the use of a line of telegraph covering the whole route of said railway as above described together with the batteries, machinery and apparatus necessary for operating the same and to that end permitted the Telegraph Company to enter upon the premises of the Railway Company for the purpose of constructing said line of telegraph which has been already partially constructed.

Now Therefore, For, and in consideration of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company may construct so far as the same is not already constructed, a telegraph line upon the property of the Railway Company as hereinbefore described to be completed ready for use on the first day of January, 1904, and that so far as it legally may it hereby grants and agrees to assure to the
107 Telegraph Company the exclusive right of way on and along the line and lands of the Railway hereinbefore described, and on any extensions and branches thereof for the construction and use of lines of poles and wires, and underground or other lines for Commercial and Public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of piles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound to do so transport men or materials for the construction or operation of a line of poles or wires or underground, or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railway Company's regular local rates nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided, always that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company but shall indemnify and hold

harmless the Railway Company from any and all damages costs charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may
108 hereafter be made upon property that is now or may be hereafter owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of
109 charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employes of the Telegraph Company when traveling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway as above described all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of the agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to construct so far as the same is not already constructed a substantial telegraph line, with at least two wires, which shall be for the exclusive use of the Railway Company if the business of the Railway Company requires it, and complete it ready for use upon and along the property of the Railway Company on or before the first day of January, 1904, and thereafter to furnish all materials necessary for the maintenance and repair of said line, and any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now or may hereafter be maintained.

110 V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees during the continuance of this contract to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company (and of the Chicago Great Western Railway Company so long as the said Chicago Great Western Railway Company operates and controls the said line of railway along which said telegraph line is to be completed as aforesaid) to the extent of twelve ($12.00) dollars per annum per mile of railway as above described, including any etxensions that may hereafter be made and brought under the operation of this contract, such business being charged at the regular day rates of the Telegraph Company from the point where any such messages originates to the final destination, all such Railway messages in the Telegraph Company's possession to be regarded as handled by them from point or origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company, or of the Chicago Great Western Railway Company, as may be designated by the President Vice President, or General Manager thereof,

111 annual franks of the Telegraph Company, authorizing such transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destimes to points on the Telegraph Company's

line within the United States, either upon or off the lines of said railway; and in case the telegraph business of the Railway Company (or of the Chicago Great Western Railway Company, as aforesaid) beyond its lines shall amount to more than twelve ($12.00) dollars per mile of railway per annum the excess shall be paid for at one half the regular rates of the Telegraph Company. It is understood and agreed however, that the Telegraph Service herein provided for is to be in addition to like service to which either company may be entitled to under other contracts with the Telegraph Company and it applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car or steamer berths or other accommodiations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of two wires upon all the railway covered by this agreement and any extensions thereof in case the Railway Company require the same, free of charge; but that until
112 the Railway Company shall find it necessary to have the sole use of said wires the commercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned the same shall be paid for by the Railway Company and in case an additional wire or wires shall be required for commercial business the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come under the terms of this contract as to maintenance, repairs and renewals. In case the two wires or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

VIII: It is mutually understood and agreed that the Railway Company is not to be responsible for, and the Telegraph

Company hereby agrees to save harmless the Railway Company and indemnify it against any loss or damage that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting
113 as agents of the Telegraph Company; nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said railway, and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company against any loss or damages arising from, or on account of any error, delay or default in the transmission or delivery of any messages sent for the Railway Company under this agreement.

IX. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries and blank forms and stationery for local business as hereinbefore provided.

X. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XI. The provisions of this agreement shall be and continue in force for eighty-four (84) years from the date hereof, and in case of any disagreement concerning the true
114 intent and meaning of any of the provisions of this contract the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and the third by the two chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In Witness Whereof, The parties hereto have caused the

names of their respective presidents to be hereunto subscribed and their corporate seals to be attested the day and year first above written. Def. E

MASON CITY & FORT DODGE RAILWAY COMPANY,

By R. C. WRIGHT,
Vice President.

Attest:
CHAS A. TALMAN,
Asst. Secretary.

Form approved:
A. G. BRIGGS,
General Attorney.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER.
Vice Pres. & Genl. Mgr.

Attest:
CHAS. P. BRUCH,
Asst. Secretary.

Approved for execution
General Manager.

(Endorsed) Filed May 20, 1909, H. S. Stoddard, Clerk.

115 And afterwards to-wit: on the eighth day of June, 1909, came the receivers in said entitled cause by their solicitors, and filed in the clerk's office of said court, their certain Demurrer to the intervening petition of the Post Telegraph-Cable Company. Said Demurrer is in words and figures following to-wit:

United States of America,
Northern District of Illinois,
Eastern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
—*vs*—
Chicago Great Western Railway Company,
Defendant.
In Equity.

Demurrer of Charles H. F. Smith, and Horace G. Burt, To Petition of Intervention of Postal Telegraph Company.

To the Honorable Judges of said Court, in Chancery Sitting:

Charles H. F. Smith and Horace G. Burt, as Receivers of the Chicago Great Western Railway by protestation not confessing or acknowledging all or any of the matters or things in the petition of intervention of the Postal Telegraph Cable Company contained to be true, in such manner and form as the same are therein set forth and alleged, demur to the said bill, and for cause of demurrer show:

1. That said petitioner, Postal Telegraph Cable Company in and by said petition made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioners
116 own showing by said petition, that it is not entitled to such relief.

2. That said petition of the said petitioner, the Postal Telegraph Cable Company, is wholly without equity.

3. That it does appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Receivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay, and which these Receivers might not legally refund to petitioner.

Wherefore, and for divers other good causes of demurrer

appearing in said petition, said Receivers demur thereto and pray judgment of his Honorable Court, whether they should be compelled to make further or any answer to said bill, and they pray further to be hence dismissed with their reasonable costs in their behalf sustained.

GARDNER, STERN & ANDERSON and H. LOOMIS,
Solicitors for Receivers.

A. G. BRIGGS,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated this 7th day of May, 1909.

A. G. BRIGGS,
Of Counsel for Receivers.

117 State of Minnesota } ss.
County of Ramsey. }

Charles H. F. Smith makes solemn oath and says, that he is one of the Receivers of the Chicago Great Western Railway Company, against whom judgment is sought to be obtained by the Petition of Intervention of the Postal Telegraph Company; that the foregoing demurrer is not interposed for the purpose of delay, and that the same is true in point of fact.

CHAS. H. F. SMITH.

Subscribed and sworn to before me this 7th day of June, 1909.

G. F. PHILLEO,
(Seal) *Notary Public,*
Ramsey County, Minnesota.

My Commission expires Nov., 18, 1909.

(Endorsed) Filed June 8, 1909, H. S. Stoddard, Clerk.

And afterwards to-wit: on the sixteenth day of March, 1909, came the Special Master and filed in the clerk's office of said court his report on the Intervening petition of the Postal Telegraph-Cable Company. Said report is in words and figures following, to-wit:

118 IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.

Notice is hereby given that I have drafted my report upon the intervening petition of the Postal Telegraph-Cable Company. A copy of said draft is hereto attached.

Notice is further given that I will hear any objections that you may have to my said report as so drafted at the office of the Clerk of the Circuit Court of the United States, in the city of Chicago, Illinois, on the 16th day of March 1910, at 10 o'clock in the forenoon, and at the said place and time I will settle my said report and you are then and there required to file any exceptions which you may have to my said report as so settled. Under existing orders exceptions not so filed at said time will not be considered by the Court.

(Signed) A. R. MOORE
Special Master.

Dated St. Paul Minn., March 4th, 1910.

To

Messrs. Loesch, Schofield & Loesch,
Attorneys for the Postal Teleg.-Cable Co., Petitioner, The Temple, Chicago, Ill.

To

Messrs. Winston, Payne, Strawn & Shaw, Attorneys for the Receivers and the C. G. W. R. R. Co., First. Natl. Bank Building, Chicago, Ill.

119 IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird, *et al.*, *Complainants*,
vs.
Chicago Great Western Railway Company, *Defendant.*

To the Honorable Judges of the Circuit Court, Above Named, in Chancery Sitting:

In Re Intervening Petition of the Postal Telegraph-Cable Company.

The petition of the Postal Telegraph-Cable Company above referred to was filed in the office of the Clerk of the above entitled Court on the 20th day of May 1909, and was thereafter transmitted by said clerk to me for my consideration, pursuant to an order made and entered in the above proceedings by the terms of which all intervening petitions filed in this cause by which the intervener seeks to recover any money or any property from the Receivers were referred to me for my investigation and report.

Thereafter and on or about the 8th day of June, 1909, the Receivers filed their demurrer to said intervening petition and assigned as the grounds thereof—

1—That said petitioner, Postal Telegraph-Cable Company, in and by said petition has not made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioners own showing by said petition, that it is not entitled to such relief.

120 2. That said petition of the said petitioner, the Postal Telegraph-Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Receivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay,

and which these receivers might not legally refund to petitioner.

By agreement of Counsel said demurrer was set down for hearing before me on Tuesday, the 28th day of September 1909, at 10 o'clock A. M. at the office of the clerk of the above entitled Court. At said time and place Frank J. Loesch, Esq., appearing as Solicitor for the petitioner and Mr. F. S. Winston, as Solicitor for the petitioner, and Mr. F. S. Winston, as Solicitor for the Receivers and the C. G. W. R. R. Co. Mr. P. J. Farrell, Solictor for the Interstate Commerce Commission appeared as amicus curiae.

The question raised by said demurrer were fully argued by Counsel and briefs were submitted with reference thereto. After due consideration thereof, I respectfully report that said demurrer is well founded in point of law and should be sustained by the Court. I therefore respectfully recommend that an order be entered to that effect and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition.

All of which is respectfully submitted.

Dated, this March 16th, 1910;

A. R. MOORE,
Special Master.

(Endorsed) Filed March 16, 1910, H. S. Stoddard, Clerk.

121 And on the same day to-wit, the sixteenth day of March, 1910 there was filed in the clerk's office of said Court in said entitled cause certain objections to Special Master's Report in words and figures following to-wit:

Def Ex

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

John A. Humbird *et al*
Complainants,
vs.
Chicago Great Western Railway Company,
Defendant.

In Re Intervening Petition of Postal Telegraph Cable Company.

OBJECTIONS TO SPECIAL MASTER'S REPORT.

Objections taken by the above named Intervening Petitioner to the report of A. R. Moore, the Special Master in Chancery, to whom this cause stands referred for investigation and report on the intervening petition of Postal Telegraph Cable Company.

First: For that the said Special Master has found and reports that the demurrer filed to said intervening petition is well founded in point of law and should be sustained by the Court; whereas the said Special Master should have found and reported that said demurrer to said intervening petition is not well founded in point of law and should be overruled by the Court.

Second: For that the said Special Master has recommended that an order be entered sustaining said demurrer and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition; whereas the said Special Master should have recommended that an order be entered overruling
122 said demurrer and requiring said receivers to plead to or answer said intervening petition within a short day to be fixed by the terms of said order.

Third: For that the said Special Master should have found that the petitioner, Postal Telegraph-Cable Company by its petition has stated a cause of action which entitles it to the relief as therein prayed for;

In all of which particulars the said Intervening petitioner

objects to the said report, and submits that the same ought to be altered and varied.

(Signed) WILLIAM E. O'NEILL
Solicitor for Postal Telegraph-Cable Company, Intervening Petitioner.

The foregoing objections are each overruled and my report settled as originally drafted.

Dated March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed) Filed March 16, 1910, H. S. Stoddard, Clerk.

And afterwards to-wit, on the fourth day of April, 1910, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

123 John A. Humbird, *et al*
vs.
Chicago Great Western Railway Company } 28934

This cause having come on to be heard upon the written stipulation of the parties hereto by their respective attorneys, and the court being fully advised in the premises, it is hereby Ordered that the objections heretofore filed by Postal Telegraph-Cable Company to the report of the Special Master in Chancery, stand as exceptions to such report, before the Court, and that the hearing on said exceptions be, and the same is hereby set for the fourth (4th) day of May, A. D. 1910, at the hour of ten (10) o'clock A. M.

And on to-wit: the fourth day of May, 1910, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry, to-wit:

124 Order of Wednesday, May 4, 1910.

Def
Ex

Kohlsaat, Judge.
John A. Humbird, *et al.*,
Complainants,
vs.
Chicago Great Western Railway Company.
} No. 28934 Chancery

Now come the parties by their solicitors and now comes on to be heard the objections of the Postal Telegraph Cable Company to the special master's report heretofore filed herein, and the court having heard the arguments of counsel to conclusion overrules said objections. Thereupon it is ordered that said master's report be and the same is hereby approved. Thereupon the demurrer of the receivers to the petition of said Postal Telegraph Cable Company is heard and sustained, and it is further ordered that the said petition be and the same is hereby dismissed at the petitioner's costs.

And thereupon said petitioner enters its motion for an appeal to the Supreme Court of the United States.

125 Northern District of Illinois, } ss.
Eastern Division. }

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be true and complete copies of the certain order entered of record in the Circuit Court of the United States for the Northern District of Illinois, on the twenty-third day of January, 1908, appointing Special Master in Chancery, Intervening Petition of the Postal Telegraph-Cable Company, filed May twentieth, 1909, Demurrer of Receivers, filed June eighth, 1909, Special Master's Report, filed March 16, 1910, Objections filed to Special Master's Report March sixteenth, 1910, Order entered of record April fourth, 1910, and Order entered of record May fourth, 1910, in the cause entitled, John A. Humbird, et al. Complainants, vs. Chicago Great Western Railway Company, Defendant, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this twenty-fourth day of April, 1916.

T. C. MacMillan,
Clerk.

(Seal)

126 Mr. Dittus: If the court please, I desire to offer in evidence extracts from pages 410 and 411 of the 31st Interstate Commerce Report, dated July 15th, 1915, relating to free passes, and so on, on railroads.

Mr. Kelly: No objection.

The Court: Just a minute. What was the date of Exhibit 2?

Mr. Dittus: Just a minute. That was May 4th, 1910.

The Court: All right. Mr. Reporter, you may mark this last document Defendant's Exhibit 3.

(Said document was thereupon marked by the reporter "Defendant's Exhibit No. 3")

The Court: Is there any objection to defendant's Exhibit 3?

Mr. Kelly: No, no objection, your Honor.

Mr. Dittus: No, there is no objection.

The Court: Very well. Defendant's Exhibit No. 3 may be admitted in evidence.

(Which said extracts from Interstate Commerce Report, being so offered and received in evidence, without objection, and having been marked Defendant's Exhibit No. 3, and the same are in the words and figures following, to-wit:)

127 EXTRACT FROM PP. 410,411 OF 31 INTERSTATE COMMERCE REP. JULY 15TH, 1915.

"IV.

"The practice of granting free transportation of passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers. It appears from the Commission's compilation of the answers to the questions addressed by it to the carriers, that there were issued during the eleven months ending November 30th, 1913, by seventy-eight of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of $482,709. These trip passes represented 88,575,298 pasenger-miles.

"June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger-miles.

The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger-mile in official classification territory in 1913, the passenger-
miles represented by trip passes alone would have yield-
128 ed in passenger revenue $18,520,000. Some of these passes were no doubt issued to employees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

129 Mr. Kelly: I neglected one thing that we had talked about.

Mr. Dittus: I remember we talked of stipulating that these railroad telegraph contracts with the various carriers were filed with the Interstate Commerce Commission shortly after November, 1907.

Mr. Dittus: Yes.

Mr. Kelly: Then it may be stipulated in the record that on or about November 1907, the Interstate Commerce Commission entered an order that all common carriers, subject to the Act to Regulate Commerce, should file with the Interstate Commerce Commission copies of all contracts that they had at that time, with the various telegraph companies of a similar character to the contract invoked in this case; and that subsequently to that order, such contracts of all common carriers so subject to the Act to regulate commerce, were filed with the Interstate Commerce Commission.

Mr. Dittus: Before I call the witness, I desire to refer to paragraph 4 of the Defendant's answer.

By stipulation between counsel, it is agreed that in the year 1914, the telegraphing done by the defendant for the complainant, under the contracts referred to in the amended bill of complaint, amounted to $7,985.13, at regular public rates; that during said year the railroad transportation of men by complainant for the defendant, under said contract amounted to $2,844.12 at regular public rates; that during that year

complainant furnished defendant approximately $1200.00
130 for transportation of material at regular public rates;
that in the year 1915, the telegraphing done by the defendant for the complainant, under the contracts referred to in the amended bill of complaint, amounted to $9,100.04 at regular public rates; during said year, the railroad transportation of men by complainant for the defendant under said contract amounted to $2,480.46 at regular public rates; that the transportation of material by the complainant for the defendant, in said year, amounted to not more than $1200.00 at regular public rates. I think that is substantially correct.

Mr. Kelly: The complainant is willing to make that stipulation, subject to objection, as to its competency or materiality.

Mr. Dittus: Yes.

Mr. Kelly: Have you the figures also, Mr. Dittus, as to the value of the labor, which the complainant company furnished for the maintenance and repair and construction of the telegraph lines of the telegraph company during those periods which you have mentioned.

Mr. Dittus: No.

Mr. Kelly: May it also be stipulated that the value of the services furnished by the Railroad Company, during the periods referred to by Mr. Dittus, was approximately seventy-five per cent of the total cost of maintenance of such telegraph wires, and that the balance, or twenty-five per cent. represented the value of the material furnished by the Telegraph Company.

Mr. Dittus: Is that about right, Mr. Baker?

Mr. Charles M. Baker: I don't understand the question.

Mr. Kelly: We cannot get the exact figure, Mr. Baker, but I am advised by our superintendent of telegraph that that is
the proportion. That is, the value of our labor is about
131 seventy-five per cent. while the value of the material is
twenty-five per cent. of the total cost of maintenance and repair.

Mr. Charles M. Baker: I cannot answer that question.

Mr. Dittus: I regret that my attention was not called to that prior. I have not considered that, your Honor, I don't know just how I can stipulate to that, under the present conditions, although I would like to do so.

The Court, Well, we will just hold it open.

Mr. Kelly: I don't think that is material, but if the other figures are going in, we ought to have that in too, I don't

think this question is very material. The other day, when I talked with Mr. Dittus about the case, I did not have that information.

Mr. Dittus: Mr. Baker, will you take the stand? I will call Mr. Baker, your Honor, as a witness.

CHARLES M. BAKER, called as a witness in behalf of the defendant, having been first duly sworn by the court, was examined in chief by Mr. Dittus, and testified as follows:

Live at Chicago, Illinois, General Superintendent of plant of the Postal Telegraph-Cable Company, about three years, and connected with the Postal Telegraph-Cable Company thirty-four years, in construction work near the entire time Had supervision of all the construction, furnishing of materials and the securing of rights of way and franchises
132 and overseeing of the work in general; during that time have secured rights of way for the Telegraph-Company; there are many methods of doing that. It depends largely upon the railroad the right of way is to be secured. If on a highway it is necessary to apply to the county commissioners in the county through which the lines run, and also to the road commissioners for the right of constructing the line on the highways. If the line is built upon private property we have to secure the rights from the property owners. On the highway we get releases from the property owner now. Formerly we did not. On railroads we make an attempt to secure right of way on an equitable basis. If that cannot be done, we then proceed to condemn a right of way.

Postal Telegraph-Cable Company has condemned rights of way on many railroads, on the Atchison, Topeka & Santa Fe and Mobile & Ohio, the Union Pacific, the Oregon Short Line, The Chicago & Alton, the Southern, and the Georgia Railway, and many others. In these instances the value of the right of way condemned has been determined by a jury. In other instances we have entered into agreements with the railroad companies in reference to the value of the right of way taken by the Telegraph Company. We have contracted with the following railroads for rights of way: Atchison, Topeka & Santa Fe, Union Pacific, Southern Pacific, Frisco, Rock Island, Kansas City and Southern, the Texas Pacific, Missouri, Kansas & Texas, St. Louis & Southwestern, Missouri Pacific, and the Southern Railroad, and many others.

All those railroads was a purchase for cash, not an exchange of privileges. $10 per mile has been the universal charge
133 for a perpetual right of way. The Postal Telegraph-Cable Company maintains rights of way and lines on the line of railroads. The comparative cost and convenience of maintenance of telegraph rights of way on and off the railroads very much depends upon the railroad, that is, on the number of trains that are operated over the railroad, as to getting to the source of the trouble. If a railroad has but few trains it takes much longer to get to the point of trouble than it does on a highway line. I don't figure that there is any difference in the cost of maintenance of a line on and off the railroad. The only advantage in the highway road would be the ability to get to the scene of trouble quickly, and the obvious disadvantage would be the presence of trees which we would not have any right to trim more than was necessary.

I was connected with the Postal Telegraph-Cable Company at the time this contract was entered into, in December, 1888, I think I am familiar with the number of miles of telegraph lines that they had in operation at that time. I examined the line at that time or soon thereafter. It consisted of a line of telegraph poles carrying two wires most of the distance. Some of the branch lines that I did not cover I understood had but one wire on. As to this I am not positive. About 769 miles of line were taken over under this contract. The value of that line, that is of the tangible property—poles and wires and telegraph instruments and so on—was supposed to be worth $87,000. That is what we paid for it. It was considered by us to be about the fair physical valuation. I helped make the estimate for it.

Under this contract the Postal Company has maintained
135 two wires for the use of the Railroad Company during the period of the contract. In case of wire trouble where wires have gone down and the trouble is being remedied the Railroad Company gets the first two wires recovered on the line; that has been the practice and it is so provided for by the contract. It has been so since 1907.

I know of several railroads in this country that do their own telegraphing business, that own their own telegraph wires. The Chicago, Milwaukee & St. Paul have a portion of their system, between fourteen and fifteen hundred miles, from Mobridge and Tacoma. According to the tariff book they maintain about 100 commercial offices. The Pennsylvania Railroad East of Pittsburgh. I cannot tell you the approximate mileage of their telegraph lines. The Canadian Pacific Railroad.

I do not know the approximate mileage of telegraph lines maintained by that company. These railroads that I have named as maintaining their own telegraph lines do a public commercial business. They maintain offices along the stations on their line where they receiver commercial messages from the public and transmit them.

Cross-Examination.

I should judge there are approximately 300 railroad companies operated in the United States at this time. The greater number of them have a contract or contracts either with the Postal Company or with the Western Union Company similar in all essentials to the contract of the Postal Company with the Chicago Great Western Company. These contracts have existed between railroad companies and
136 either the Western Union or the Postal Company since practically the inception of telegraphing in this country, for a great many years, that is true. At the inception of the telegraphing business all the telegraph lines were not constructed on railroad rights of way, but it was the endeavor at that time to secure rights of way on railroad companies' rights of way for the construction of such lines. At this time when the railroad company makes an offer to the telegraph company, what we consider a favorable offer, we consider it. It hasn't been the practice of the Postal Company wherever possible to secure a right of way along the right of way of a railroad company in preference to getting one along a highway. That has been the practice with the Western Union. The right of way of the railroad company is generally regarded as being highly desirable for the construction of a telegraph system. It has been and it is to-day. It is not our endeavor now wherever possible to secure a right of way on such a right of way of the railroad company. It has not been our policy to do that for the last ten years. These condemnation proceedings to which I referred were not all prior to ten years ago. Many of them were subsequent. In those cases we were not able by virtue of negotiations with the particular railway company to reach an agreement as to the use of their right of way for our system.

Desiring to have those rights of way and feeling that they were desirable and essential, we condemned them. The figures of $10 a mile which I have said has been the uniform figure for perpetual rights of way on the lines of the railway
137 companies, refers to the figure in the contracts with the

railway companies. Where we condemn a right of way it costs very much less, less than $10 a mile on many of the railroads. We never condemn on a highway. We have condemned individual pieces of property for trimming privileges, etc., along the highway, but no continuous right of way on a highway.

I would judge that the cost of maintenance along the lines of the railway company right of way and on a highway is about the same. As to whether it is a little cheaper along the right of way of a railroad company where the facilities are more accessible, much depends upon the manner in which we can get over the road. If we have facilities on the road for handling material and men it may be better. On the various roads with which we have contracts we have uniform motor car facilities on very few of them. We have on the Great Western. The Great Western Company furnishes motor car service for our men making these repairs and also for the transportation of supplies wherever there is any trouble. The railroad company takes care of the trouble. Is taken care of at once.

We have our stations and linemen very much nearer together on the highway lines than we do on the railroad lines, and we can cover the territory nearly as quickly on an automobile or motorcycle on a highway as we do on a railroad. When you take into consideration the contract and facilities we have furnished us on the railroad it does not follow that our expense on the highway is greater than on the railway. We have a great number of men assigned for repair and maintenance work; not altogether for repair work. We have test offices and linemen in these test offices. We
138 have men stationed at more frequent intervals along a highway than along the railroad. That does not mean a much larger force for repair and maintenance work.

Under the contract the Great Western has the right to the first two wires put back into service when there has been any trouble along the line. Where two wires are recovered one of the wires is frequently given to the Postal Company immediately. That has been the practice for a number of years. If the railroad company needs an exclusive use of those two wires it takes them.

Since 1907 we have endeavored so far as possible to comply with this contract that we have with the Great Western. Since 1907, so far as the operation of this contract has come under the operation of my department I think it has been complied with in all respects by both companies.

There has been during the past several years many instances where supplies were transported by the railroad company for the telegraph company under the terms of this contract; that is being done to-day. I have an annual pass over the Great Western for this year; had one for the last year and the year before that. One year I did not get it. I cannot recall what year. I think I could have gotten it.

There are a great many stations along the line of the Great Western Railroad Company where the Postal Company does not maintain any independent operation. I should say there are not over a dozen points on the Great Western where we maintain an independent operator.

139 There are two wires on the right of way for the exclusive use of the railroad company. The number of wires on the right of way vary from two up to twenty. The railroad company has a number of signal wires and telephone circuits on these same poles. As to telegraph wires the railroad company has but the two.

The number we have varies on different sections of the road. From Chicago to Dubuque we have eight to twelve wires. From there west it is a hard matter for me to give you the number. All over the system we have from two to ten. These wires are classified as through wires and local wires. I cannot answer how many through wires we have. On the through wires business between terminal points only is handled. The Railroad Company never secures the use of those wires, except possibly in some time of trouble. Ordinarily they are reserved exclusively for the use of commercial business of the telegraph company. It is over those wires that the bulk of the commercial business of the telegraph company through that particular section of the country is transmitted.

Mr. Dittus: The defendant rests.

The Court: Let the record show that the defendant rests.

Whereupon The Defendant Rested Its Case.

140 And thereupon the plaintiff to further maintain the issues on its behalf, introduced the following evidence in rebuttal, to-wit:

Mr. Kelly: Now, if the court please, I have here a sheaf of requests for passes and free transportation of material and supplies from the Telegraph Company to the Railroad Company, extending over the past several years, which I under-

stand may be received in evidence, without my having them identified by the officers under whose jurisdiction they come. And may it also be stipulated that the requests for transportation, as contained in these papers, and for the dead-head service on material and supplies, were in all cases complied with.

Mr. Dittus: Oh,—well, yes. I think that is satisfactory.

Mr. Kelly: I will just offer this batch in evidence.

Mr. Dittus: Perhaps it will shorten the record by simply stipulating that there have been requests made, and they have been granted. Then you might introduce a typical letter. It would shorten the record considerably.

The Court: On that point, the witness for the defendant is the only witness who has testified, and as far as I konw, he is pretty well versed on it, and he says that the contract has been lived up to by both sides, as far as they could.

141 Mr. Kelly: I just wanted it in the record, so that I could refer to the fact that the letters and requests are all in substantially the same language. For instance, here is a letter from Mr. Baker's office, under date December 21, 1916, which says: "I beg to list the following outstanding items on our books of freight bills sent to your company on which we should have received dead-head services, under the contract. Kindly advise when we may expect your draft in refund of the improper charges?" Then I have the vouchers.

The Court: Well, they may be received, although—

Mr. Kelly: May it be stipulated that copies may be substituted for the originals.

The Court: Just a minute. It makes your record so very long that I would not put them in, unless there is some dispute. It seems almost unnecessary, as I view it, to put them in. As the court understands the situation, you have a case here where there has been an effort to comply with the law, regardless of whether it was right or not.

Mr. Dittus: If your Honor please, I think perhaps, if that has been the result of this evidence, that Mr. Baker might be recalled. I don't think the intention was for him to conclude or arrive at a conclusion that there was any compliance with the contract, or otherwise. He wanted to state the fact, that this thing has been done, but the net result of this was that we have been charging the Great Western Company with the difference. In other words, we have kept track of

142 all of this stuff that they have furnished, and what we

have furnished, and we have been charging them with the difference.

Mr. Kelly: Only since the date of the Conference Ruling.

Mr. Dittus: Whether that constituted a living up to the contract is questionable. At any rate, that is a legal conclusion.

The Court: Yes, that is certainly a legal conclusion, but in your opening statement, you announced that by reason of the decision of the Circuit Court of Appeals in 1907 of the case in the United States Circuit Court, the question was res adjudicata; and your opposing counsel suggested that in any event since that time both sides had proceeded to comply with the contract, so far as furnishing material and hauling men were concerned.

When this gentlemen was on the stand, Mr. Baker, I asked the question, and he was also asked the question by the counsel whether, so far as he knew, the parties had lived up to or complied with the contract, since 1907. Of course, the purport of my question was up to the time when the Interstate Commerce Commission made this ruling in 1916.

Mr. Kelly: They never kept track before that time.

The Court: The question for the court to decide is whether the action of the parties spelled a new contract. It is also for the court to decide whether the proceedings in the Circuit Court, in 1907, terminated the contract of itself; and also the effect of the existence of the contract, either by the acts of the parties or by their written instrument,
143 whether that is binding in any way at the present time, in view of the Interstate Commerce Commission's ruling of 1916.

Mr. Dittus: Yes, that is my theory.

The Court: I think I have the facts clearly in mind. I understood that it pertained up to the time when you began complying with the ruling of the Interstate Commerce Commission.

Mr. Kelly: I might state that subsequent to that time, we have been complying with this contract, and these requests—why, this very letter from Mr. Baker himself is dated December 21st, 1916.

The Court: I will say, if the Interstate Commerce Commission's ruling is valid, that any attempt on your part to comply with the contract, after their ruling, wont have any bearing upon the ruling of the Interstate Commerce Com-

mission. In other words, parties cannot act in violation of a ruling, if that ruling is valid.

Mr. Kelly: I understand, but my contention is that the ruling is valid, and on that theory, we have gone ahead. And the Postal Company, while they contend it is valid, they have gone ahead, also, and they have complied with this contract.

The Court: It is entirely proper for them to go ahead and ask you to do certain things, in view of the fact that part of the contract is valid, according to them, and part is invalid. They would have to present bills and do certain work for you, because it has not been determined whether it is valid, and they certainly concede that the major portion of it is binding upon them up to this time; and this suit only assails
144 a portion of the contract. So I don't think, in view of what the reporter now has, as to our position, that it is necessary to attach your exhibits at all.

Mr. Kelly: All right. Mr. Perkins, will you take the stand?

G. O. PERKINS, called as a witness on behalf of the complainant, in rebuttal, having been first duly sworn by the court, was examined in chief by Mr. Kelly, and testified as follows:

Am Superintendent of Telegraph and Signals, Chicago Great Western Railroad Company since 1910. My immediate previous employment was in Mexico, Superintendent of Telegraph on the National Railway. Have been engaged in the telegraph business approximately 39 years. Am familiar with the contract between the Postal Company and the Great Western Company. Am in direct charge of the telegraphing that was done over the Great Western; over the telegraph wires, etc., and maintenance work and repair work all comes under my supervision. Under the contract between these companies the Great Western Company furnishes the labor for all maintenance and repair work and the Postal Company furnishes the material. The value of the labor as compared to the value of the material used in maintenance and repair work is about 75 per cent of the total, and the material about 25 per cent. That has been true ever since I have been connected with the Great Western Company. Under the contract at the present time the total mileage of the commercial wires used by the telegraph company is 7101. The two wires re-

served exclusively for the railroad company do not comprise all of the wires used by the railroad. It has wires of its own. Under the contract all the wires used by the railroad comprise 4084 miles. On some of the commercial wires of the tele-
145 graph company only through business is transacted. The commercial tolls collected at stations where no independent operates are maintained by the Postal Company in 1916 amounted to $10,632.22; in 1815 to $12,030.98; in 1914 to $10,695.42. I estimate the cost of maintenance for the parts of the line under the contract at about $32,000 a year, of which the Railroad Company pays $24,000 for labor and the Telegraph Company $8,000 for material.

The messages sent collect over our line and sent paid to our line from the Postal offices amounted to $8,602.84 in 1916; $8,412.27 in 1915; $8,599.54 in 1914. These amounts are in addition to the previous cash receipts which I have mentioned.

Cross-Examination.

The tolls collected at these offices by the Great Western Company on the telegraphing business includes the tolls on messages from the place of origin to the place of destination. I am not referring to the proportion of the toll which would be applicable to the mileage on the Great Western line. I should not say that the greater portion of those tolls are applied to lines off the Railroad Company. I do not know what proportion of those tolls are earned on the lines of the Great Western Company.

Re-direct Examination.

For repair and maintenance work we do not maintain a gang on each division, but we maintain one gang the year round for use wherever needed and in time of emergency we employ as many gangs as are necessary.

146 Whereupon the complainant rested its case in rebuttal.

Which was all the evidence offered or received on the hearing of the above entitled cause.

Forasmuch as the foregoing matters and proceedings do not fully appear of record, and to the end that the same may be made and become of record, the complainant, the Chicago, Great Western Railroad Company, within the time allowed by the court, tenders this its certificate of evidence containing

all of the evidence essential to the decision of the questions presented, which was offered or received upon the trial of the above entitled cause, and prays that the same may be signed, sealed and allowed by the Judge presiding at the trial of said cause in pursuance of the statute in such case made and provided.

All of which is accordingly done this 12th day of October, A. D. 1917.

EVAN A. EVANS,
Judge of the United States Circuit Court of Appeals, sitting as District Judge, presiding at the trial of said cause.

Oct. 12, 1917.
O. K.
J. E. DITTUS,
Counsel for defendant.

(Endorsed) Filed Oct. 12, 1917, T. C. MacMillan, Clerk.

Filed Oct. 14, 1917.

43 And on to-wit: the fourteenth day of August, 1917, there was filed in the clerk's office of said court, in said entitled cause, a certain Opinion in words and figures following to-wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant.*	In Equity, No. 735.

Plaintiff in this suit seeks to compel defendant to comply with the terms of a certain contract made December 26, 1888, between the defendant and plaintiff's predecessor, and to restrain the prosecution of certain actions instituted by defendant to collect moneys alleged to be due for services rendered plaintiff by defendant. Sufficient allegations appear in the

bill and are admitted in the answer and were conceded upon the trial to give a court of equity jurisdiction of the cause. In other words, it is conceded that if the contract be upheld, the decree must be for the plaintiff. Opinio Aug

The contract under consideration provided generally for the rendition of service by the parties to this action to each other and was to continue for ninety-nine years from its date. The substance of a very similar contract is set forth at some length in the opinion of the court in deciding the cases of Baltimore & Ohio Railroad Company vs. Western Union Telegraph Company, 241 Fed. 162. Only a few of the more important paragraphs will be quoted. Paragraphs 2, 3, 7 and 8 read as follows:

"II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and
45 agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

"III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business of

Filed Jan. 4, 1917.

said Company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway."

"VII. The Telegraph Company agrees to transmit free over its lines beyond said Railway telegraph lines, business of the Railway Company to the extent of $10,—per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to said officers of the Railway Company as may be designated by the President, Vice-President, or general manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10—per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers."

"VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the
46 same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires the Commercial business of the Telegraph Company

shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the terms of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have the free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use."

Defendant's counsel attempts to make a distinction between what is termed "on line" service and "off line" service. When the railroad transports material or supplies for use on its own right of way, the service is described as "on line" service. When the carrier transports material or supplies over its road to be used in constructing or repairing the telegraph company's lines beyond the carrier's lines it is "off line" service. When the same company conveys messages to points beyond the lines of the carrier, the service is said to be "off line" service. Defendant assails the present validity of that portion of the contract that calls for the rendition of "off line" service at other than regular rates.

The precise question is this:—Under the laws as they exist today, can a carrier or telegraph company render "off line" service to the other at a rate other than that published in the regular schedules and different from the rates charged the general public?

Plaintiff answers this question in the affirmative and for its authority relies upon an act of Congress enacted June 18, 1910, generally referred to as an amendment to the Interstate Commerce Act.

The material portion of the act relied upon reads as follows:

47 "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, and to telegraph, telephone and

ed. 1917. cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, or to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. * * *

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Provided, that messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services."

In support of its contention that the "exchange of service" referred to in this amendment supports the contract in question, reference is made to the court's opinion in the case of Baltimore & Ohio Railroad Company vs Western Union Telegraph Company, 241 Fed. 102, which decision has since been affirmed by the United States Circuit Court of Appeals for the Second Circuit.

In view of this authority, I announce my conclusions, which differ from those of the learned courts whose opinions have been referred to, with some hesitancy.

The history of the times, so far as it pertains to the regulation of commerce, is out of harmony with plaintiff's contention. From 1887, when the Interstate Commerce Act was passed, down to the present time, it has been the evident intent and purpose of Congress to require the railroads to render service at reasonable and uniform rates. While less appreciated generally, the value of uniformity in the rates charged by a common carrier is as great as the advantage that comes from reasonable rates.

48 Not only was it the purpose of Congress to secure uniformity of rates in the act to regulate commerce enacted in 1887, but that intent and purpose has been since frequently

re-expressed in the various amendments to that act that have been passed by this same body. The Hepburn amendment, enacted in 1906, not only expressed such an intent but endeavored to avoid evasions of the law. After this amendment became effective, section 6 of the act to regulate commerce, generally known as the Interstate Commerce Act, read as follows:

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carried refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: * * *"

Two decisions by the United States Supreme Court followed shortly thereafter and are particularly enlightening. In the case of Chicago, I. & L. Ry. Co. vs. United States, 219 U. S., 486, the court said:

"The decisive question in this case is whether the contract between the railway company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the company, in return for the transportation which it agreed to furnish and did furnish to the Munsey publisher over its interstate lines, and to his employes and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of Louisville & Nashville R. R. Co. v Mottley, ante, p. 467, just decided, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the railway company of advertising, not of money in the payment of the interstate transportation furnished to the publisher of the Munsey magazine, his employes and the immediate members of his and their families, was for the reasons given in the Mottley case, in violation of the com-

merce act. The facts in the present case show how easily, under any other rule, the act can be evaded, and the ob-
49 ject of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money."

In the case of Louisville & Nashville Railroad Company vs. Mottley, 219 U. S. 467, the court said:

"In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation "different" in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier."

"* * * The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. In the first of the cases last above cited (the Goodridge case) the court, referring to the practice of allowing rebates, said: "So opposed is the policy of the

act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. * * *"

The foregoing is but a brief account of the history of railroad rate regulation pertinent to the question under consideration, and a brief statement of the law as it stood in 1910, when the amendment to the act to regulate commerce, re-
50 lied on by the plaintiff, was enacted. The railroads were then without authority to make a contract with a telegraph company or any one else, whereby as carriers they rendered services at rates different from those charged the general public. This state of the law was the result of successive acts of Congress, each succeeding one going further than its predecessor in eliminating discriminating and preferential rates.

It is claimed by the plaintiff, however, that this act of June 18, 1910, amending the act of February 4, 1887, (Comp. st, 1916, sec. 8563, subdivision 3) gave to the carrier the authority which was denied it by the previous acts of Congress as interpreted by the Interstate Commerce Commission and the Supreme Court of the United States.

Examining the history of this amendment, we find that the purpose and object of the legislation was to include telegraph, telephone and cable companies, etc. within the provisions of the act to regulate commerce. The amendment of 1910 was not intended to in any way effect the regulation of railroads. It neither added to nor detracted from the power of carriers in respect to rates. The amendment had for its object the bringing within government regulation quasi-public corporations, somewhat similar in their nature and business to common carriers, and was in harmony with public sentiment throughout the nation voiced by legislation, both state and national. If the carrier did not have the authority to make the contract prior to 1910, it is difficult to see how an act bringing telegraph and telephone companies within the provisions of the law furnished the authority.

But the learned counsel for the plaintiff contends that the amendment was passed by Congress with a full appreciation on its part of the close relation and inter-dependence of telegraph companies and carriers and with a full appreciation of

the difficulty encountered in charging regular rates for the varied services rendered. Appreciating this situation, it
51 is claimed, that the amendment of 1910 expressly ratified the form of contract in existence between most of the telegraph companies and the carriers of the country, which contracts were in all material respects similar to the one here under consideration.

Defendant does not seriously dispute that the effect of this amendment was to ratify the contract so far as "on line" service was concerned, but denies that it gave validity to these contracts so far as "off line" service was concerned.

In view of the defendant's contention, it is interesting to examine the reports of the Commission and the decisions of the courts to determine whether there was in fact a distinction between "on line" service and "off line" service of a carrier.

This court's attention is called to the 21st Annual Report of the Interstate Commerce Commission, page 25, where the commission, speaking of the telegraph railroad contracts said:

"So far as the Commission could see, the full performance of such contracts by the carriers with whom they are made would not effect any public or private interest adversely. Nevertheless, the Commission knows of no provision of law now in force that vests it with authority, or any clause in the law that affords it a reasonable ground to differentiate "off line" service of carriers by telegraph companies by transportation of merchandise or any other form of private property for shippers."

In the case of Santa Fe, Prescott & Phoenix Ry. Co. vs. Grant Bros. Construction Co., 228 U. S. 177, the following language used by Mr. Justice Hughes, speaking for the entire court, is instructive.

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-fare carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See Matter of Railroad-Telegraph Contracts, 12 I. C. C. Rep. 10, 11."

52 Still another decision by the Supreme Court supporting the Interstate Commerce Commission ruling and reversing a decision of the Commerce Court, is that of the In-

terstate Commerce Commission vs Baltimore & Ohio R. R. Co., 225 U. S. 326. The question in that case was whether the railroad company could charge a different rate for transportation of coal to a given point to a railroad than to other shippers, the coal being intended for the use by the railroad as fuel. The court held that the rate charged must be the same as the rate charged other persons for the same service. In that case the court said.

"The circumstances and conditions which may so far be considered as distinguishing traffic so as to take from different transportation charges the vice of preference, have been described by this court. In Wright vs. United States, 167 U. S. 512, 518, it is said: 'It was the purpose of the section (2) to enforce equality between shippers and it prohibits any rebate or any device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage are compelled to pay different prices therefor.'"

Again the court said:

"It is admitted that the fact that the railroad is the shipper or consumer is not a circumstance or condition that effects the carriage nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. * * * It must be kept in mind that it is not the relation of one railroad to another with which we may have any concern, but the relation of the railroad to its patrons, who are entitled to equality of charges."

The amendment of 1910 made the telegraph and telephone companies common carriers within the meaning and purpose of the act to regulate commerce. The amendment did not in any way modify section 6 of the act to regulate commerce, as amended by the act of June 28, 1906, which expressly provided:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

53 The difficulty experienced in determining the value of its service, and the inability of the carrier to classify such service as it renders the telegraph company, referred to by the

plaintiff's attorney, applies to "on line" service only. No difficulty should be experienced by the carrier in charging the telegraph company its regular rates for transporting material over its line to be delivered to a connecting carrier for further conveyance. In this respect it acts as a common carrier and in reason and justice should comply with that cardinal rule of railroad rate regulation, namely, that all rates shall be uniform and the same to all patrons.

The plaintiff's counsel, with much zeal and commendable industry, has collected a large number of definitions of the word "exchange," while defendant's counsel has also furnished the court with a number of definitions of that word. While not unmindful of the value of lexicons in a case like the present, the court is satisfied that the correct construction to be placed upon the term "exchange of service" cannot be gathered from dictionaries alone.

If this court were to adopt the construction given by the plaintiff's attorney, it would impute to Congress a reversal of its settled policy and give validity to a contract which at common law was contrary to public policy. Congress, in passing this amendment, acted in the light of judicial construction of similar legislation and was aided by the conference rulings of the body delegated by it to enforce the law it was about to enact. In the face of the history of railroad legislation, this court is not justified in construing a phrase so as to permit a common carrier, acting as such, to render service to one patron at rates different from those charged other patrons, when a different construction is reasonably open.

Under all the circumstances, the court concludes that the "exchange of service" referred to in the amendment of 1910 validated the contract so far as it pertained to "on line" service, but such act did not validate the contract so far as it provided for compensation other than regular rates when either company rendered the other "off line" service.

The fact that the contract may have been valid when executed will not overcome the effect of the amendment of 1906, which clearly prohibited such contracts as are here sought to be enforced. New York Central & Hudson River Railroad Co. vs. Gray, 239 U. S. 583. C. I. & L. Railway Co. vs. United States, supra.

In reaching this conclusion, no consideration has been given the conference rulings of the Interstate Commerce Commission made since the enactment of the amendment of 1910. These rulings, while not conclusive (Atchison, Topeka & Santa Fe. Ry. Co. vs. United States, decided June 4, 1917),

are entitled to great weight and should not be lightly overruled. Opin

On June 8, 1912, the Commission approved its conference ruling No. 364, which is as follows:

"Exchange of services by telegraph and railroad companies * * * Under the amendatory act of June 18, 1910, it is provided "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry: Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreements."

On July 15, 1914, the Commission approved the following conference ruling:

"Upon inquiry as to whether or not, under the provision of Section 1, 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under section 6 of the act: Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of section 6 of the act, and of the reasonable charges of said telegraph company regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad—that is to say, when such transportation is not conducted by said railroad as a common carrier."

This ruling was re-affirmed on March 26, 1916.

Surely the conclusions of the body delegated by Congress to enforce the statute, is entitled to great weight in a case like the present. The rulings of administrative bodies charged with the enforcement of certain statutes have very generally been given careful consideration and credit by the

ed 1917. courts. Pennell vs. Philadelphia & Reading Ry. Co., 231 U. S. 675. United States vs Trans-Missouri Freight Association, 166 U. S. 290.

The contract in the present case was modified some years after it was made, but the rights of the parties so far as this case is concerned, were not changed in any respect by the modification.

The contract, so far as it provides for compensation for "off line" service at rates other than those charged the general public, is invalid. Plaintiff's bill must be dismissed. Let a decree be so entered.

Dated, Chicago, August 14, 1917.

(Signed) EVAN A. EVANS
Acting District Judge.

(Endorsed) Filed Aug. 14, 1917, T. C. MacMillan, Clerk.

1917. 56 And on to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph-Cable Company, a corporation.
} 735.

This cause having come on to be heard at this term of court upon the amended bill of complaint herein, the answer thereto and the replications of such complainant to said answer and the proof taken in said cause having been argued by counsel for the respective parties, and the court having duly considered the same and in consideration thereof the court having found that the equities in this case are with the defendant and that the bill of complaint of the complainant is without equity.

It is therefore Ordered, Adjudged and Decreed as follows, viz:

That the bill of complaint, as amended, be and the same hereby is dismissed for want of equity at complainant's costs to be taxed herein.

EVAM A. EVANS,
Judge.

57 And on towit: the fourteenth day of September, 1917, came the complainant in said entitled cause by its solicitors and filed in the clerk's office of said court, its certain petition for appeal and assignment of errors in words and figures following to-wit:

58 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant*.	In Equity No. 735.

PETITION FOR ORDER ALLOWING APPEAL.

The above named plaintiff, Chicago Great Western Railroad Company, conceiving itself aggrieved by the decree entered on September 14th, 1917, in the above entitled cause, dismissing the appeal of the plaintiff as amended for want of equity, does hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Seventh Circuit, and it prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made may be sent to the Circuit Court of Appeals of the United States for the Seventh Circuit.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

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1917.

ASSIGNMENT OF ERRORS.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company a corporation, *Defendant*.	In Equity No. 735

Assignment of Errors.

Now comes plaintiff and respectfully shows that the court in the proceedings and decree in the above entitled cause committed manifest error in each of the following respects:

1. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, and in dismissing said bill for want of equity.

2. The district court erred in not granting an injunction as prayed in plaintiff's bill of complaint as amended.

3. The district court erred in holding that the contracts of December 26th, 1888, and February 5th, 1902, made by and between the defendant and the predecessor companies of this plaintiff, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway Company, were invalid in so far as said contracts provided for compensation for "off line" services at rates other than those charged the general public.

4. The district court erred in holding that said contracts of December 26th, 1888, and February 5th, 1902, made by and between the defendant and the predecessor companies of this plaintiff, the Chicago, St. Paul and Kansas City Railway Company and the Chicago Great Western Railway
60 Company were not valid and subsisting contracts binding upon said defendant and enforcible against it, in so far as said contracts provided for compensation for "off line" services at rates other than those charged the general public.

5. The district court erred in holding that the amendment of June 18th, 1910, amending the act of February 4th, 1887,

(Compiled Statutes 1916, Section 6563, Subdivision 3), did not validate the said contracts of December 26th, 1888, and February 5th, 1905, in so far as said contracts provided for compensation at other than regular rates when either the plaintiff or the defendant rendered "off line" services.

6. The district court erred in holding that under the Act to Regulate Commerce as amended, common carriers by railroad and telegraph companies cannot render "off line" service to the other at a rate other than that published in the regular schedules, and different from the rates charged the general public.

7. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, enjoining and restraining the defendant from prosecuting the suits at law now pending in the Municipal Court of the City of New York, and in the Appellate Division of the Supreme Court of New York between the defendant and this plaintiff, and restraining and enjoining the defendant from bringing any action of any kind against this plaintiff arising in or from the collection of telegraph tolls, except such as may arise from or under the said contracts of December 26th, 1888, and February 5th, 1902.

8. The district court erred in denying an injunction as prayed in plaintiff's bill of complaint as amended, requiring the defendant to continue to furnish to the plaintiff, its officers, agents and employes the telegraphic service provided for in said contracts of December 26th, 1888, and February 5th, 1902.

61 9. The district court erred in admitting in evidence, over the objections of the plaintiff, the certificate of the Postmaster General certifying that the defendant had accepted all the restrictions and obligations required by law, said certificates being marked Defendant's Exhibit No. 1.

10. The district court erred in admitting in evidence, over the objections of the plaintiff, transcript of record in the case of John A. Humbird et al, vs. Chicago Great Western Railway Company, said transcript being marked Defendant's Exhibit 2.

11. The district court erred in admitting in evidence, over the objections of the plaintiff, evidence as to the amount of telegraphing done by the defendant for the plaintiff during the years 1914 and 1915, and evidence as to the transportation of material by the plaintiff for the defendant in the year 1915.

nt of filed 1917. 12. The district court erred in admitting in evidence, over the objections of the plaintiff, evidence of the witness Baker as to the manner of securing rights of way for the defendant.

13. The district court erred in not granting an injunction restraining the defendant as prayed in plaintiff's bill of complaint as amended, during the pendency of this appeal.

Wherefore the plaintiff prays that said decree be reversed.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

Sept. 62 And on the same day, to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph Cable Company, a corporation. } 735.

This cause coming on for hearing this 14th day of September, 1917, upon application for an appeal by the plaintiff, together with its assignment of errors, an appeal is hereby allowed and bond for appeal is hereby fixed in the sum of five ($500) dollars, and said plaintiff is hereby given 30 days in which to present and file its certificate of evidence herein.

EVAN A. EVANS,
Judge.

63 And on the same day to-wit: the fourteenth day of September, 1917, there was filed in the clerk's office of said court a certain Bond of Appeal, in words and figures following to-wit.

64 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*,
vs.
Postal Telegraph-Cable Company, a corporation, *Defendant*.
} In Equity No. 735

APPEAL BOND.

Know All Men By These Presents, that Chicago Great Western Railroad Company, a corporation, as principal and George A. Kelly, as surety, are held and firmly bound unto the Postal Telegraph-Cable Company, defendant, in the full and just sum of five hundred ($500.00) Dollars, to be paid the said defendant, its successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Witness the hands and seals of the parties hereto this 14th day of September, A. D. 1917.

The condition of the above obligation is such that whereas the above named Chicago Great Western Railroad Company has prayed and has been allowed an appeal to the Circuit Court of Appeals of the United States for the Seventh Circuit to reverse the decree entered in the above entitled cause by the District Court of the United States for the North-
65 ern District of Illinois, Eastern Division, on September 14th, 1917.

Now, if the above named Chicago Great Western Railroad Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make good its appeal, then

the above obligation to be void, otherwise to remain in full force and virtue.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
By S. M. FELTON,
President.

(Seal)
Attest:
J. T. COYKENDALL,
Secretary.

GEORGE A. [illegible],
By .....

Approved this 14th day of Sep. 1917.

EVAN A. EVANS,
Judge.

O. K.
J. E. DITTUS,
Atty for Deft.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

Sept. 66 And on the same day to-wit: the fourteenth day of September, 1917, in the record of proceedings in said entitled cause, before the Hon. Evan A. Evans, Circuit Judge, appears the following entry to-wit:

Chicago Great Western Railroad Company, a corporation,
vs.
Postal Telegraph Cable Company, a corporation.
} 735.

This cause coming on to be heard on the motion of the plaintiff for an order granting an injunction as prayed in the plaintiff's bill of complaint as amended, pending an appeal herein, and the same arguments having been suggested to the court in support of this motion that were suggested by and on behalf of the plaintiff on the application for a permanent injunction at the final hearing, and the court having heard the arguments of counsel, and being fully advised in the premises, denies the said motion and declines to grant the order for an injunction pending an appeal.

To which action of the court the plaintiff then and there duly excepted.

EVAN A. EVANS,
Judge.

147 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Chicago Great Western Railroad Company, a corporation, *Plaintiff*, *vs.* Postal Telegraph-Cable Company, a corporation, *Defendant*.	In Equity No. 735

PRAECIPE FOR RECORD.

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the clerk of the Circuit Court of Appeals of the United States for the Seventh Circuit, under the appeal heretofore allowed by the District Court of the United States for the Northern District of Illinois, Eastern Division, and include in the said transcript the following pleadings, proceedings and papers on file:

1. The plaintiff's bill of complaint as amended, the answer of the defendant to the bill of complaint as amended, and reply of the plaintiff to the answer of the defendant to the bill of complaint as amended.
2. All motions, material orders and decrees filed.
3. Certificate of evidence.
4. Opinion of the district court.
5. Petition for order allowing appeal, order allowing appeal, assignment of errors and appeal bond and order denying motion for an injunction pending appeal.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors for Plaintiff.

Received a copy of the foregoing praecipe for record this 14 day of September, 1917.

JACOB E. DITTUS,
Solicitors for Defendant.

(Endorsed) Filed Sep. 14, 1917, T. C. MacMillan, Clerk.

148 Northern District of Illinois, } ss.
Eastern Division. }

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Transcript of the proceedings had of record in said Court, made in accordance with Praecipe filed in the cause entitled Chicago Great Western Railway Company, versus Postal Telegraph-Cable Company, Equity No. 735, as the same appear from the original Records and Files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Chicago, in said District, this twelfth day of November, A. D. 1917.

T. C. MacMillan,
Clerk.

(Seal)

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit; do hereby certify that the foregoing printed pages, numbered from 1 to 104, inclusive, contain a true copy of the printed record, printed under my supervision, and filed January 4, 1918, on which this cause was argued, heard and determined in the case of Chicago Great Western Railroad Company vs. Postal Telegraph-Cable Company, No. 2548, October Term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of March A. D. 1918.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Courtroom in the City of Chicago in said Seventh Circuit, on the Second Day of October, 1917, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Seventeen and of Our Independence the One Hundred and Forty-second Year.

And afterwards, to-wit: On the sixteenth day of November, 1917, in the October term aforesaid, came the appellant, by its counsel, Mr. John Barton Payne, Mr. Ralph M. Shaw and Mr. George A. Kelly, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1917.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD CO., Appellant,

vs.

POSTAL TELEGRAPH-CABLE CO., Appellee.

The Clerk will enter my appearance as counsel for the appellant.

JOHN BARTON PAYNE.
RALPH M. SHAW.
GEORGE A. KELLY.

Endorsed: Filed Nov. 16, 1917. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the nineteenth day of November, 1917, in the October term last aforesaid, came the appellee, by its counsel, Mr. Jacob E. Dittus, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 19—.

No. 2548.

CHICAGO & GREAT WESTERN RAILROAD CO., Appellant,

vs.

POSTAL TELEGRAPH-CABLE CO., Appellee.

The Clerk will enter my appearance as counsel for the appellee.

JACOB E. DITTUS,
1801 *Conway Bldg., Chicago.*

Endorsed: Filed Nov. 19, 1917. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-second day of January, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 22, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH CABLE COMPANY.

Now this day come the parties by their counsel, and counsel for appellant now presents a motion for an extension of time to file its brief and the Court having heard the oral arguments of Mr. Ralph M. Shaw, counsel for appellant in support of said motion, and by Mr.

Jacob E. Dittus, counsel for appellee, in opposition thereto, it is ordered that brief for appellant be filed within three days and that brief for appellee be filed by February 6, 1918, and cause is hereby set down for hearing on February 6, 1918.

And afterwards, to-wit: On the sixth day of February, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, February 6, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier:

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

THE CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

It is ordered by the Court that the Inter-State Commerce Commission may file a brief in this cause.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

THE CHICAGO AND GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel

and on oral arguments by Mr. Ralph M. Shaw, counsel for appellant, and by Mr. Jacob Dittus, counsel for appellee, and by Mr. Albert L. Hopkins, counsel for Interstate Commerce Commission, and the Court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the twenty-eighth day of February, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court, the Opinion of the Court in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1917, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Before Baker, Kohlsaat and Alschuler, Circuit Judges.

BAKER, *Circuit Judge*, delivered the opinion of the court.

In 1888 the parties entered into a railroad-telegraph contract for exchange of services. They renewed it after the 1910 amendment of the Interstate Commerce Act and faithfully observed its terms until after the Interstate Commerce Commission's conference ruling of March 28, 1916. In essential scope the contract in suit is the same as one set forth in Baltimore & O. Rld. Co. v. Western Union Tel. Co., 241 Fed. 162. That case (affirmed, same title, 242 Fed. 914) is also referred to for a recital of amendments of the Interstate Commerce Act and of various pronouncements of the Interstate Commerce Commission.

Appellant unsuccessfully prosecuted this suit to enjoin appellee's repeated actions at law to collect full rates for "off line" telegrams and to compel appellee to accept railroad service in exchange under the contract.

As the Western Union case is pending in the Supreme Court, we have taken this case now only on the representations of the Postal Company that there are important facts in this record which were not adduced in the Western Union case and that it would be advantageous to have both records before the Supreme Court at the same time.

We find no additional facts that in our judgment enlarge or change the questions for decision. They arise from the following provisions in the Interstate Commerce Act:

"Nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

"This provision (against passes and free transportation) shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this act."

We approve and adopt the propositions declared in the Western Union case, substantially as follows:

(*a*) "Exchange" means the giving of one thing for another. It excludes the idea of first measuring the respective things in money value and then settling or paying any difference. To construe the act in its entirety as requiring a reference to monetary scales is to render the proviso meaningless. "Exchange" and "services" are without any limitation or qualification put upon them by the language employed by Congress; and therefore the companies may lawfully give, each to the other, any service of the kinds they perform for the public. As the language is clear, direct and unambiguous, there is no warrant for the interpolation of a distinction between "on line" and "off line" services.

(*b*) Congress adopted the amendment of 1910 in the light of public history, showing that generations ago the railroad and the telegraph started and have since continued hand in hand as co-servitors of the public under the well-known reciprocal contracts which were first challenged a few years prior to 1910. Congressional purpose in the 1910 amendment, therefore, was to end the challenge.

Additionally we suggest:

(*c*) Emphasis may be given to "contract" as well as to "exchange" and "service." Full and unrestricted right to contract with each other is what the plain language of the proviso gives. If one may deal with the other for "off line" service only as the Interstate Commerce Act compels carriers to deal with the public, then no contract rights, as distinguished from legislatively declared legal obligations, can exist, and the grant of power is in that respect emasculated.

(*d*) So entwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the others. Inasmuch as Congress supposedly was aware of this situation, a confession by appellee that Congress intended to legitimatize the exchange of "on line" services is a confession, in our judgment, that Congress had the intent to approve the known exchange of services rather than the intent to split the unsplittable and from the fragments to make for the parties a new contract.

(*e*) Telegraph companies were not brought under control to the same extent as railroad companies. For the latter, rates may be fixed; respecting the former, there was only the bringing into national law of the common law requirement that rates be reasonable. If a telegraph company should believe that a published railroad rate for "off line" service was unreasonable, it could go before the Interstate Commerce Commission and that body could fix a reasonable rate. But, places changed, the railroad company could only contest in court the reasonableness of a particular rate for services already rendered, with the telegraph company free to promulgate new rates according to its own judgment of reasonableness. Did Congress in-

tend that this inequality of situation should control? Or did not Congress rather intend that their mutual agreements for exchange of services should prevail?

(*f*) "Evils to be remedied," as a part of "the history of the times," may be looked to in confirmation of the unambiguous language of the proviso. We perceive no evils in the contracts, no injury to the public; appellee suggests none; and the Interstate Commerce Commission in 1906 reported that "So far as we now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely." 12 I. C. C. 10.

(*g*) Appellee is a telegraph company. But cable companies are included in the same terms. Appellee enumerates "on line" services it renders for appellant; but so far has failed to state how an undersea cable could be of "on line" service to a railroad, or how a railroad could be of "on line" service to a cable. Appellee's contention that the proviso authorizes nothing but contracts for exchange of "on line" services (services on a common or joint right of way) therefore comes to this: Railroad and cable companies are authorized to contract with each other, but only for the performance of unperformable conditions.

(*h*) Appellee's contest arose wholly over compensation for telegraphic messages. Under the second proviso hereinabove quoted appellee could lawfully issue telegraphic franks to the officers and agents of appellant. But is it unlawful to do under contract and for compensation what may lawfully be done without contract and without compensation?

Decree reversed, with direction to grant the prayers of the bill.

A true Copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to-wit: On the twenty-eighth day of February, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, February 28, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with direction to grant the prayers of the bill.

And afterwards, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1918, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Assignment of Errors.

The Postal Telegraph-Cable Company, appellee in this court and appellant in this appeal to the United States Supreme Court in the above entitled cause, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says that the order and decree entered herein on February 28, 1918 is erroneous, to-wit:—

1. The court erred in reversing the decree made by the United States District Court, for the Northern District of Illinois, Eastern Division, entered on the 14th day of September, A. D. 1917 wherein and whereby it was ordered that the bill of complaint as amended be and the same is hereby dismissed for want of equity and complainant's costs to be taxed herein.

2. The court erred in reversing the decree made by the United States District Court, for the Northern District of Illinois, Eastern Division, on the 14th day of September, A. D. 1917 and directing said court to grant the prayers of the bill.

3. The court erred in not affirming the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, entered in said cause on the 14th day of September, A. D. 1917.

4. The order of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decree of the United States District Court, for the Northern District of Illinois, Eastern Division, with directions to grant the prayers of the bill, is contrary to the law and the evidence in this case.

Wherefore the said Postal Telegraph-Cable Company prays that said order of the United States Circuit Court of Appeals, in and for the Seventh Circuit, may be reversed and that the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in said cause may be affirmed.

Dated March 8, 1918.

JACOB E. DITTUS,
Solicitor for Postal Telegraph-Cable Co., Appellant.

WM. W. COOK,
Of Counsel.

Endorsed: Filed Mar. 12, 1918. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Appeal, which said Petition for Appeal is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1917, January Session, 1918.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

The above named appellee, Postal Telegraph-Cable Company, conceiving itself aggrieved by the order and decree made and entered by the above named court in the above entitled cause under date of February 28, 1918, wherein and whereby the decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in said cause was reversed with directions to grant the prayer of the complainant's bill, the decree of said District Court so reversed having ordered that said complainant's bill be dismissed for want of equity, and this being a case in which a judgment or decree of said Circuit Court of Appeals is not made final and that the matter in controversy in this suit exceeds $1,000.00 besides costs, does hereby appeal from said order of the Circuit Court of Appeals reversing said decree of the District Court, with directions to grant the prayer of the complainant's bill, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, directing the clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, to send the record, proceedings and papers in said cause, with all other things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed may be reviewed and if error be found, corrected according to the laws and customs of the United States.

JACOB E. DITTUS,
Solicitor for Postal Telegraph-Cable Co.

WM. W. COOK,
Of Counsel.

Endorsed: Filed Mar. 12, 1918. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, March 12, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

Before:
Hon. Samuel Alschuler, Circuit Judge.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

2548.

CHICAGO GREAT WESTERN RAILROAD COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Upon the foregoing petition, it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States, be and the same is hereby allowed as prayed, on filing appeal bond in usual form in penal sum of $500, with surety to be approved by the Clerk of this Court.

And afterwards, to-wit: On the twenty-second day of March, 1918, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond on Appeal, which said Bond on Appeal is in the words and figures following, to-wit:

Bond #12084.

Know all men by these presents, That we, Postal Telegraph-Cable Company, a corporation, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto Chicago Great Western Railroad Company, a corporation, in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Chicago Great Western Railroad Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 14th day of March in the year of our Lord One thousand nine hundred and eighteen.

Whereas, The Postal Telegraph-Cable Company has prosecuted an appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals, Seventh Circuit, entered on or about the 28th day of February, A. D. 1918, in a suit de-

pending in said court between said Chicago Great Western Railroad Company, as appellant, and said Postal Telegraph-Cable Company, as appellee.

Now, the condition of the above obligation is such, That if the said Postal Telegraph-Cable Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] POSTAL TELEGRAPH-CABLE COMPANY,
By CHAS. P. BRUCH,
Vice President.

WM. B. DUNN,
A. B. PARRISH.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, [SEAL.]
By PHILIP B. SHILLITO,
Attorney-in-Fact.
HERMAN W. BORCHERS,
Attorney-in-Fact.

Approved by:

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed: Filed Mar. 22, 1918. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 16, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of Chicago Great Western Railroad Company vs. Postal Telegraph-Cable Company No. 2548, October Term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of March A. D. 1918.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

President of the United States to Chicago Great Western Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, for the Seventh Circuit, wherein the Postal Telegraph-Cable Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court, this 22nd day of March, in the year of our Lord One Thousand Nine Hundred and eighteen.

Allowed by

KOHLSAAT,
Judge of the United States Circuit Court of Appeals, Seventh Circuit.

Service of a copy of the within citation is this day admitted. Dated at Chicago, Illinois, March 22, 1918.

RALPH M. SHAW,
GEORGE A. KELLY,
Attorneys for Chicago Great Western Railroad Company, Appellee.

[Endorsed:] No. 2548. United States Circuit Court of Appeals, 7th Cir. Chicago Great Western Railroad Co. vs. Postal Telegraph-Cable Co. Citation. Filed Mar. 22, 1918. Edward M. Holloway, Clerk. Jacob E. Dittus, Att'y for Appellee.

Endorsed on cover: File No. 26,426. U. S. Circuit Court of Appeals, 7th Circuit. Term No. 959. Postal Telegraph-Cable Company, appellant, vs. Chicago Great Western Railroad Company. Filed April 10th, 1918. File No. 26,426.

FILE COPY

FILED
DEC 10 1918
JAMES D. MAHER,
CLERK

NO. [redacted]404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

POSTAL TELEGRAPH-CABLE CO., *Appellant.*	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.
vs.	
CHICAGO GREAT WESTERN RAILROAD, *Appellee.*	

BRIEF AND ARGUMENT FOR APPELLANT.

BYNUM E. HINTON,
ATTORNEY FOR APPELLANT.

WILLIAM W. COOK,
JACOB E. DITTUS,
ODE L. RANKIN,
Of Counsel for Appellant.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

INDEX.

	PAGE
Argument	40
Historic view of the relationship of railroads and telegraphs	5
Historic view of commerce regulation	15
Hepburn amendment and rulings and decisions under it	17
Legal question involved	4
Nature of cases	2
Nature and provisions of contracts	6
Origin of the case	1
Points and authorities	36
Post Roads Act—Application of	59
Spirit of the Act	50
Statement	1
Various attitudes of parties	30

Table of Cases Cited.

Express Companies v. *United States*, 212 U. S. 522.	53
Hastings, etc., Rd. Co. v. *Whitney*, 132 U. S. 357, 366.	38
Heath v. *Wallace*, 138 U. S. 573, 582	38
Holy Trinity Church v. *U. S.*, 143 U. S. 457	50
Interstate C. Com. v. *D. L. & W. R. R.*, 220 U. S. 235, 251	40
Interstate C. Com. v. *B. & O. R. R.*, 225 U. S. 326	39
Interstate C. Com. v. *B. & O. R. R.*, 145 U. S. 284	37
L. & N. R. Co. v. *Mottley*, 219 U. S. 467	22, 39
McDonald v. *Hovey*, 110 U. S. 619	37
Penn. R. Co. v. *I. C. M. Co.*, 173 Fed. 1	39
Santa Fe Ry. Co. v. *Grant Bros.*, 228 U. S. 177	40, 54
Texas & Pac. Ry v. *Interstate C. Com.*, 162 U. S. 218.	36
The Abbotsford, 98 U. S. 440	37
United States v. *C. I. & L. Ry. Co.*, 163 Fed. 114	22
United States v. *Moore*, 95 U. S. 760, 763	38
United States v. *Dickson*, 15 Pet. (40 U. S.) 141, 165	37

IN THE

Supreme Court of the United States

POSTAL TELEGRAPH-CABLE CO., *Appellant.*	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.
vs.	
CHICAGO GREAT WESTERN RAILROAD, *Appellee.*	

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT.

ORIGIN OF THE CASE.

Three cases involving the legality of typical and similar contracts between telegraph companies and railroad companies for the interchange of their utilities service for other than a money consideration at published tariff rates, are before this court for review. They arise under the Interstate Commerce Act as amended, and rulings of the Interstate Commerce Commission under that act. Because of their similarity these cases have been set for hearing on the same date, and we believe, therefore, it is not out of place to discuss them collectively.

Two of these cases involve contracts of the Postal Telegraph Cable Company, and one case involves a contract of the Western Union Telegraph Company. The titles of these cases are: *Chicago and*

Great Western Railroad Company v. *Postal Telegraph-Cable Company; Postal Telegraph Cable Company* v. *Tonopah & Tidewater Railroad Company,* and *Baltimore & Ohio Railroad Company* v. *Western Union Telegraph Company.*

For brevity these three cases will herein be referred to as the Great Western case, the Tonopah case and the B. & O. case. We will also refer to the respective railroad companies by those designations, and to the Postal Telegraph-Cable Company as The Postal Company, and to the Western Union Telegraph Company as The Western Union Company.

The Great Western case comes from the United States District Court for the Northern District of Illinois, Eastern Division, through the Circuit Court of Appeals for the Seventh Circuit. The Tonopah case comes from the Municipal Court of the City of New York, through the Appellate Division of the Supreme Court of that State direct to this court; and the B. & O. case comes from the United States District Court for the Southern District of New York through the Circuit Court of Appeals for the Second Circuit.

NATURE OF CASES.

The Great Western case is a bill in equity brought to obtain a mandatory injunction to compel specific performance by the Postal Company of that portion of their contract stipulating for the joint use of certain operating facilities and providing for free telegraphic service to be rendered by the Postal Company to the Great Western Company, and also to enjoin the prosecution of certain suits commenced

by the Postal Company against the Great Western Company in the New York State Courts, where a recovery was sought for telegraphic services rendered. (Tr.—*Postal* v. *C. G. W.* 3.)

The Great Western case was heard upon bill, answer, replication and oral and documentary evidence, and a decree was entered therein dismissing the bill for want of equity. (Tr. 96, 245 Fed. 592.) From such decree the Great Western Company appealed to the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court of Appeals reversed the decree of the District Court with instructions to grant the prayer of the bill. (Tr. 110, 249 Fed. 664.) The Postal Company brings the record to this court on further appeal.

The Tonopah case is a suit at law brought by the Postal Company to recover for telegraphic services rendered by the Postal Company to the Tonopah Company in which the Tonopah Company set up as a defense their operating agreement which provided for free telegraphic services to be rendered by the Postal Company to the Tonopah Company.

The B. & O. case was also a bill in chancery and was brought in the District Court of the United States for the Southern District of New York by the B. & O. against the Western Union Telegraph Co. to enforce the specific performance of a contract similar to the contracts in the Great Western and the Tonopah cases. There was a decree upon the prayer of the bill. (241 Fed. 162.) The Western Union Company removed the case by appeal to the Circuit Court of Appeals for the Second Circuit, where the decree was affirmed. (242 Fed. 914.) A

further appeal has brought that case to this court, where it is docketed as No. 26021 at the October term, 1917.

THE LEGAL QUESTION INVOLVED.

Briefly we will state the legal question this court is called upon to consider upon the record of these three cases and to which we shall later address our argument.

The legal question is whether or not an operating agreement between a telegraph company and a railroad company, which provides that the telegraph company shall furnish free commercial telegraphic service to the railroad company off the line of the railroad company, and that the railroad company shall furnish to the telegraph company free commercial transportation for men and material destined to places off the line of the railroad company or in transit on business other than that of their joint undertakings, without reference to the published tariff rates of the companies, is prohibited or permitted by the Interstate Commerce Act as amended in 1906 and 1910, which provides as follows:

> "All charges made for any services rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable as aforesaid, or in connection therewith shall be just and reasonable; and every unjust and unreasonable charge for said services or any part thereof is prohibited and declared to be unlawful; provided * * * that nothing in this act shall be construed to prevent telephone, tele-

graph and cable companies from entering into contracts with common carriers for the exchange of services."

The Interstate Commerce Commission has ruled that any exchange of off the line, public utility or commercial services, between such companies, must be made upon the basis of their published tariff rates, those rates to which the general public is entitled.

In order that the court may get the setting of this legal question we deem it advisable here to collect together the historical data out of which grows the record of these three cases.

HISTORICAL VIEW OF THE RELATIONSHIP OF RAILROADS AND TELEGRAPHS.

About the middle of the nineteenth century the use of the telegraph became largely identified with railroad operations. The rapid and accurate transmission of telegraphic orders for the purpose of train movement speeded the operation of trains carrying passengers and freight into the various business centers. The idea of linking together the various social and business centers of the country by binding together the various railroad telegraph systems for the convenient and rapid transmission of intelligence throughout the country was the basis of the type of contracts here in question. Through joint operation under working agreements, the lines of telegraph used by railroad companies were put into the service of a superimposed telegraph system which tied together the railroad telegraph lines into one commercial telegraph system. The opportunity

thus afforded to communicate readily from any newly established business center on any railroad line with other portions of the United States through such telegraph system became one of the governing factors in the development of our commercial life.

This practice of joint operation by railroads and telegraph companies, under contracts such as here in question, has been openly followed since the middle of the last century. The existence of these contracts and the operation under them is a matter of common knowledge. The contract in the B. & O. case was entered into on October 15, 1887; the one in the Great Western case was entered into on December 26, 1888; and the one in the Tonopah case on June 26, 1907. The question of the validity of such contracts is now raised as being inconsistent with the provisions of the Interstate Commerce Act passed by Congress under its constitutional power to regulate commerce.

NATURE AND PROVISIONS OF CONTRACTS.

These contracts are substantially the same. They contain many provisions which it is apparent and will be conceded were never intended to be disturbed by congressional legislation. These portions of contracts in question deal with the internal management and operation of these utilities as distinguished from the product or service furnished by the utility as common carriers for the convenience and use of the general public. In other words, no question is raised on any of these records as to the

right of telegraph companies and railroad companies to carry out contracts for exchange of telegraph service on a railroad itself for railroad transportation of telegraph men and material to be used on that railroad. The controversy here is over free telegraphing to and from points off the railroad and free railroad service for telegraph men and material not used on the railroad furnishing such free transportation.

Some of the provisions common to all these contracts generally speaking are, that a portion of the wires shall be for the exclusive use of the railroad company in handling its private telegraphic business, except that when these exclusive railroad wires are not in actual use the telegraph companies may use them for sending local messages to the various stations; that the telegraph companies shall furnish all the materials necessary to keep the lines in a state of repair and that the railroad companies shall furnish the labor necessary to make the repairs and transport the material and equipment to such place on the line, as it may be needed, without charge; that the telegraph operators in the employ of the railroad company at its various stations shall handle the business of the telegraph company transmitted to such stations. The Western Union contract in the B. & O. case provides for a joint superintendent of telegraph who shall be under the supervision of the telegraph company so far as its business is concerned and under the supervision of the railroad company so far as its telegraphic business is concerned, such superintendent to be paid jointly, etc. There are other provisions in the con-

tracts pertaining to the operation and control of the system established, but the ones just mentioned will serve to briefly illustrate the nature of the joint underaking.

Paragraphs three and seven of the contract between the Postal Company and the Great Western Company, which are called in question in this case, are as follows (Tr. 52 and 53, *Postal* v. *C. G. W. R. R.*):

> "III. The railway company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the telegraph company, employees of the telegraph company, when traveling upon the business of said company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway."
>
> "VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines, business of the railway company to the extent of $10 per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the telegraph company, and for this purpose the telegraph company will issue to said officers of the railway company as may be designated by the president, vice-president or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of

messages relating strictly to the railway or corporate business of the railway company, originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the telegraph company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the railway company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car or steamer berths, or other accommodations for customers of the railway company, the tolls upon which should be properly chargeable to such customers."

Paragraphs ten and eleven of the contract between the Western Union and B. & O., which is called in question in their case, is as follows (Tr. 29, *W. U.* v. *B. & O.*):

"*Tenth.* The telegraph company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the railroad company pertaining to its railroad business between all cities, towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the telegraph company or its subordinate companies in any of the said cities, towns and places, and when so received shall be transmitted by the telegraph company over said

telegraph lines free of charge. And if the same for any reason of convenience to the telegraph company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or other authorized officer thereof, annual franks authorizing the free transmission messages relating strictly to the railroad business of the railroad company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the telegraph company, or its subordinate companies, in the telegraph company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding Ten Thousand Dollars ($10,000.00) per annum calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined. And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the railroad company, the tolls on which should properly be chargeable to such customers.

Eleventh. The railroad company agrees to transport, free of charge over its said railroads, on application of the superintendent or other proper officer of the telegraph company, all em-

ployees of the telegraph company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge all poles and other material and supplies of the telegraph company for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also material and supplies for the establishment, maintenance and operation of the offices of both parties hereto upon said telegraph lines at places along said railroads.

And the railroad company also agrees to transport, free of charge, the employes of the telegraph company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the telegraph company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the telegraph company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding Ten Thousand Dollars ($10,000.00) per annum, calculated at the current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlement to be made yearly."

The contract between the Postal Company and the Tonopah Company was entered into after the passage of the Hepburn Amendment in 1906, and after the Interstate Commerce Commission had ruled that railroad companies could not issue free

transportation to telegraph company employees unless such employees were engaged in the repair, maintenance or supervision of the joint operating convenience of the contracting companies. The contract in the Tonopah case must, therefore, be read in the light of the Hepburn Amendment, and the interpretation placed thereon by the commission. The Tonopah contract gives the railroad free telegraphic off the line service, but binds the Postal Company to pay the published rates of the Tonopah Company for its off the line service. This arrangement resulted from the fact that at the date of the contract the Tonopah Company was subject to the commerce act restriction while the Postal Company was not.

Paragraphs nine, ten and eleven of the Postal-Tonopah contract are as follows (Tr. 17-20, *Postal v. Tonopah, Etc. R. R. Co.*).

> "*Ninth.* (1) All telegrams pertaining to the business of the railroad company between points on the lines of the railroad company shall be transmitted by the railroad company's own employees on its own telegraph lines.
>
> (2) The telegraph company agrees to issue cards or books of stamps to such officers and employees of the railroad company as may be designated by the proper officers of said company, authorizing the transmission of telegrams relative to the business of the railroad company over the lines of the telegraph company within the United States to an amount, calculated at the regular day rates of the telegraph company, not exceeding Twelve Dollars ($12) per annum for each and every mile of railroad up to two hundred (200) miles on which telegraph wires are operated under this

agreement; and not exceeding Ten Dollars ($10) per annum for each and every mile of railroad over two hundred (200) miles on which telegraph wires are operated under this agreement. The tolls on all such telegrams shall be computed at the regular day rates of the telegraph company between the points of origin and destination of such telegrams and the railroad company agrees to pay to the telegraph company the latter's regular commercial day rates on all such messages in excess of the amount of service above specified, settlement to be made annually.

(3) It is understood and agreed that the service herein provided for applies only to the transmission of messages concerning only the operation and business of the railroad company, and more over, shall not in any case be extended to messages for transmission by ocean cables or by other telegraph companies.

(4) Cards or stamps issued by the telegraph company authorizing the transmission of telegrams, when presented at commercial telegraph offices of the railroad company, shall be honored and telegrams offered thereunder shall be accepted and transmitted to and from said offices, and no charge therefore shall be made by the railroad company against the telegraph company.

(5) The railroad company and its employees shall not, without the consent of the telegraph company, transmit any messages between points on the railroad company's lines and points on the telegraph company's lines except those provided for in this agreement.

Tenth. (1) The railroad company agrees to issue to such officers and employees of the telegraph company as may be designated by the executive officers of the telegraph company annual and trip passes or tickets authorizing the free transportation over the lines of the

railroad company of said officers, employees and laborers of the telegraph company when traveling on business in conection with the construction, maintenance or operation of the telegraph line and service upon the railroad company's own right of way herein specified and provided for; and further agrees to transport over its lines free of charge to the telegraph company all such material and supplies as are required in connection with the construction, maintenance or operation of the telegraph lines and service upon the railroad company's own right of way herein specified and provided for.

(2) Said transportation (to be furnished without compensation to the railroad company other than the benefits to the railroad company of this contract) shall not exceed in any year the amount of telegraph service that the telegraph company herein agrees to perform for the railroad company and the telegraph company hereby agrees to pay to the railroad company its regular current transportation rates for such transportation in excess of said amount, settlements to be made annually.

(3) It is understood and agreed that said transportation shall be furnished by the railroad company and availed of by the telegraph company in accordance with the Interstate Commerce Act of the Federal Congress.

Eleventh. The railroad company further agrees to transport to and from regular stations over the whole or any part of its railroad all officials, employees, laborers, material or supplies of the telegraph company, as desired by the telegraph company, in connection with the construction, maintenance or operation of the telegraph company's lines and service off the line of the railroad company and the telegraph company agrees to pay in cash to the railroad company the railroad company's regular tariff rates now or hereafter established for all such

transportation of men and material; and the railroad company shall pay to the telegraph company for telegraph service actually rendered hereunder at full rates up to the amount of cash paid by the telegraph company to the railroad company for the transportation of officials, employees, laborers, materials or supplies of the telegraph company, traveling or shipped in connection with the construction, maintenance or operation of the telegraph company's lines and service off the line of the railroad company the telegraph service so paid for being considered a part of the service (at $12.00 or $10.00 per mile per annum as aforesaid), to which the railroad company is entitled as hereinabove specified in paragraph ninth."

HISTORIC VIEW OF COMMERCE REGULATION.

The regulation of Interstate Commerce by Congress of the United States was not undertaken generally until the year 1887 when the Interstate Commerce Act was passed. It has been stated that among the causes which induced Congress to legislate upon the subject of Interstate Commerce was the fact that railroads had become the principal modern instrumentality of commerce, and that as such they were natural monopolies and their operation accompanied by the usual evils of monopolies. The arbitrary service of the railroads brought loud complaints from the public. It was to cure these evils and to protect commerce that Congress passed the act which was entitled "An Act to Regulate Commerce," which had for its purpose the regulation of rates, the abolition of rebates, and the prevention of discrimination between communities and

persons. Telegraph companies were not mentioned in the Act of 1887. It has been also stated:

> "It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or mistakes of their officers or even primarily to protect such corporations against each other. The Act does indeed require them to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers." (Moore on Interstate Commerce, 36.)

In 1906 the so-called Hepburn Amendment was passed. The amendment enlarged upon the original Act and brought other public utilities under interstate regulation, and was particularly aimed at the prevention of the vice of free transportation and indiscriminate issuance of passes by the railroads. The 1906 amendment did not include telegraph companies.

There was in the amendment of 1906 a provision which has some bearing upon the question here at issue. In that amendment there is an exception to the restriction upon the issuance of passes, in this that "*Linemen of telegraph and telephone companies*" are specifically excepted from its provisions.

No judicial interpretation or administrative ruling affecting the relationship between telegraph companies and railroad companies was had until after the passage of the Hepburn Amendment in 1906.

THE HEPBURN AMENDMENT AND RULINGS AND DECISIONS UNDER IT.

The provisions of the Hepburn Amendment of 1906, restricting the use of passes is as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

This provision of the Hepburn Amendment has received administrative rulings from the Interstate Commerce Commission and judicial interpretation by the several courts of the United States including this court.

It was ruled by the commission in September, 1906 (Appendix 45, I. C. C. 57) that only money might be received in payment for transportation subject to the Commerce Act whether of passengers, or property or for any service in connection therewith. (Conference Ruling No. 207.) (Approved 219 U. S. 486.)

In October, 1906, the commission ruled (Appendix 45, I. C. C. 57) that the Hepburn Amendment did not prevent a carrier from giving free or reduced car-

riage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of the carrier, provided such arrangements for free or reduced carriage were made a part of the specifications upon which the contract was based and of the contract itself. (Administrative Ruling No. 208.) (Approved 228 U. S. 177.)

Following rulings No. 207 and No. 208 the Western Union and the Postal Telegraph Companies joined in a petition to the commission for a modification of rulings of the commission so far as they might control or govern certain contracts theretofore entered into between the petitioning companies and certain railroad companies under which, in consideration of free telegraphic service given by the telegraph companies over wires off the lines of the respective contracting railroad companies, the railroad companies agree to furnish free or reduced transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers, and in December, 1906, the commission expressed their opinion as follows (Tr. 19, *Postal* v. *C. G. W. R. R.*):

> "The commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'railway system'; and that in consideration of the construction, maintenance and operation of a telegraph line upon the right

of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carriers own right of way or the right of way of such system of roads. But the commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in conection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines."

On June 3, 1907, the Interstate Commerce Commission announced its administrative ruling No. 219, as follows (Tr. 20, *Postal* v. *C. G. W. R. R.*):

"TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.—In its decision on the petition of the Western Union and Postal Tele-

graph Companies, issued December 27, 1906, the commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a 'railway system,' may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is 'off the line' business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has a contract for telegraphic service."

On June 30, 1908, the Interstate Commerce Commission promulgated a further rule concerning the

issuance of passes as follows (Tr. 21, *Postal* v. *C. G. W. R. R.*):

> "NOTICE AS TO THE ISSUANCE OF PASSES.—It appearing that the ruling issued by the commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:
>
> Many abuses in the issuance and uses of passes have ben discovered by the commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free tranportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:
>
> 1. Officers or employees of news companies other than newsboys.
>
> 2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. * * * *"

In November, 1907, the Interstate Commerce Commission called upon all railroads to file with the commission copies of all contracts for telegraph or telephone service on their line.

(Tr. 32—*Postal* v. *C. G. W. R. R.*)

In its twenty-first annual report to Congress made in December, 1907, and again in its twenty-second annual report to Congress in December, 1908, the Interstate Commerce Commission reported its decisions and rulings upon the telegraph contracts between railroad and telegraph companies and the interpretation which it had placed upon the Hepburn amendment.

(Tr. 34—*Postal* v. *C. G. W. R. R.*)

In July, 1908, the United States Circuit Court for the Northern District of Illinois, in the case of *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114, involving a contract between the Railway Company and Munsey's Magazine for the exchange of passes for advertising, held, that only money might lawfully be received in payment for transportation. This case was subsequently affirmed by the Supreme Court, 219 U. S. 486.

In 1911 the U. S. Supreme Court decided the case of *L. & N. R'd Co.* v. *Mottley*, 219 U. S. 467, in which it was held that a contract entered into in 1871 giving an annual pass for life to the Mottleys in consideration of a release of damages for an accident was in violation of the Interstate Commerce Act as soon as that act came into existence and that the consideration for the passes was a different consideration from that required of the public in the published tariffs of the company. This case arose prior to the passage of the 1910 amendment.

There was one judicial *nisi prius* determination upon the validity of that portion of the contract between the Postal Company and the Great Western

Company which provides for the granting of free transportation to linemen of the Postal. The question was raised between the Postal Company and the Receiver for the then Chicago Great Western Company, the predecessor of the present Chicago Great Western Company. The matter was adjudicated in the receivership proceeding entitled *John A. Humbird, et al.*, v. *Chicago Great Western Railway Company*, No. 28934 in the Circuit Court of the United States, and the decree was entered therein upon the intervening petition of the Postal Telegraph-Cable Company. (Defts. Ex. 2—Tr. 43—*Postal* v. *C. G. W. R. R.*)

In the Humbird case it appeared that in February, 1909, there was a great sleet storm in the territory east of the City of Chicago, which broke down a portion of the Postal Company's wires and poles, and linemen from other portions of the country were drafted and brought to the scene of destruction to repair the lines. Four of the telegraph linemen were brought by the Postal Company from the City of St. Paul, and after the lines had been repaired application was made by the Postal Company for return transportation from Chicago to St. Paul over the Great Western. Failing to get transportation promptly and to save delay, the railroad fare was paid over the Great Western Railroad, and thereafter the intervening petition above referred to was filed for the purpose of obtaining a refund of the money paid out for the return railroad fares, upon the ground that the Postal Company was entitled to have free transportation for such linemen under their contract. The linemen had been brought to

Chicago and were returning to St. Paul upon business which arose off the line of the Great Western and had no connection with the operating service of the Great Western Railroad.

Upon the hearing before Judge Kohlsaat, then sitting in the Circuit Court, the prayer of the petition was denied, and the effect of the decision was to hold the contract for free transportation invalid under the Hepburn Amendment of 1906. The decision was acquiesced in by the Postal Company. (Tr. 71—*Postal* v. *C. G. W. R. R.*)

The record in the Tonopah case discloses the fact that there was a suit brought by the Western Union Telegraph Company against the Baltimore & Ohio Railroad Company in 1908, in the United States Circuit Court for the District of Maryland, to compel the specific performance of the identical contract in the present B. & O. case. The record discloses that the Baltimore & Ohio Company in compliance with the administrative ruling of the Interstate Commerce Commission under the Hepburn Amendment, refused to perform that part of the contract which required the B. & O. to furnish interstate transportation for employees and material in course of transit off the line of the Baltimore & Ohio Road. Before the case in the Maryland Court was tried Congress passed the amendment to the Interstate Commerce Act of 1910. Thereafter the Western Union withdrew its suit, and the bill in the Baltimore & Ohio case alleges that the parties to that suit adjusted their differences and thereafter operated under the contract as they had operated prior to the Hepburn Amendment of 1906, and continued

to so operate until the administrative ruling of March 28, 1916, was rendered by the Interstate Commerce Commission. (Tr. 89—*Postal* v. *Tonopah, etc. R. R.*)

In the record of the Great Western case it also appears that after the 1910 amendment the Postal Company and the Great Western Company likewise exchanged services in compliance with their contract as they had done prior to the Hepburn Amendment of 1906. (Tr. 80—*Postal* v. *C. G. W. R. R.*)

THE 1910 AMENDMENT AND RULINGS UNDER IT.

On June 18, 1910, Section 1 of the Commerce Act was amended to read as follows: (The additions of 1910 are printed in italics.)

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, *and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory or District of the United States, or to any foreign country,* who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. * * *
>
> All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable,* as

aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *provided, that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.*

* * *

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspec-

tors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other clamitous visitation; *and provided further, that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act; provided further, that the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier.* * *"

On March 31, 1911, Conference Ruling No. 305 was promulgated by the Commission (Tr. 32—*Postal v. C. G. W. R. R.*):

"305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.—(*a*) Each and every telegraph and telephone company

which transmits messages over its line or lines from a point in one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, is subject to the provisions of the Act. * * *

(*d*) It follows that telegraph and telephone companies subject to the Act, as above indicated, must conform to the provisions of Section 1 thereof, requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section. * * *

(*e*) Such telegraph and telephone companies subject to the Act are also governed by the provisions of Section 3 forbidding any undue or unreasonable preference or advantage of rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of Secton 15 of the Act, and also of Section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission."

On June 8, 1912, the Interstate Commerce Commission approved Conference Ruling No. 364, as follows (Tr. 32—*Postal* v. *C. G. W. R. R.*):

"EXCHANGE OF SERVICES BY TELEPGRAPH AND RAILROAD COMPANIES.—Under the amendatory act of June 18, 1910, it is provided, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry,

Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement."

On March 23, 1916, the Interstate Commerce Commission re-affirmed its prior conference rulings and promulgated Conference Ruling No. 491 (involved in these three appeals) which reads as follows (Tr. 37—*Postal* v. *C. G. W. R. R.*):

"EXCHANGE OF SERVICES UNDER CONTRACTS BETWEEN RAILROADS AND TELEGRAPH, TELEPHONE, OR CABLE COMPANIES.—Upon inquiry whether under Section 1 of the Act a railroad may contract with a telegraph company to transport the latter's property, either for use on the railroad's line or elsewhere, at a rate different to the regularly published rate for such transportation, *Held,* That such an exchange of services may lawfully be made only upon the basis of the legally estabilshed rates of the railroad and on the basis of the fixed charges of telegraph company regularly exacted of other customers for similar services; except that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contracting railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier."

THE VARIOUS ATTITUDES TAKEN BY THE INTERESTED PARTIES AND THE COMMISSION.

The respective positions taken by the parties affected by and interested in the enforcement of the commerce act are as follows:

After the passage of the Hepburn Act in 1906, the Interstate Commerce Commission took the position that the Hepburn Amendment precluded the giving of transportation by railroad companies to the men and material of the telegraph companies, except upon the basis of the published tariff rates of the companies, and ruled accordingly. (Telegraph companies were not then subject to the Act.) The exception in the Hepburn Act permitting free transportation to linemen of telegraph companies was so construed as to apply only to linemen employed along the line of the railroad furnishing such free transportation.

The Postal Company acquiesced in the ruling of the Commission and entered into its Tonopah contract upon the basis of the ruling of the Commission.

The Western Union filed its bill in the United States Circuit Court in Maryland to enforce its contract with the B. & O. Railway, on the theory, we presume, that the Mottley case was in the United States Supreme Court and would decide the question.

After the passage of the Amendment of 1910, the railroads in dealing with both the Postal Company and the Western Union Company went back to the letter of their contracts and treated them as they

had prior to the 1906 Amendment, on the theory that the proviso had enlarged the scope of the Act.

After the 1910 Amendment the Commission ruled (March 23, 1916, being the ruling involved in these three appeals) that neither railroads or telegraph companies could give or exchange their utility services upon any other basis than that of their published public tariff rates, adhering to their ruling under the 1906 Amendment and bringing the telegraph companies under the same ruling by virtue of the 1910 amendment.

After the ruling of the Commission of March 23, 1916, the Postal Company acquiesced in the ruling and sought to collect for its utility services. This time the B. & O. filed the bill against the Western Union to enforce the contract and so far they have had a very pleasant and satisfactory litigation. The B. & O. has cleverly alleged and the Western Union eagerly admitted. Their record bears evidence of very careful arrangement.

In fact the Circuit Court of Appeals in that case pointed this out when it said (242 Fed. 915):

> "The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other."

In the Great Western case and in the B. & O. case the Interstate Commerce Commission appeared by their counsel as *amicus curiae* and presented their views to the Trial and Appellate Courts.

The B. & O. case seems not to have been fully presented to the Circuit Court of Appeals inasmuch as in its opinion, the court says:

> "At stated periods the amount of 'off line'

> **business transacted by each for the other is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half the ordinary rates of each party to the agreement. The right to do this is the only question in this case."**

That would be true if both the telegraph company and railroad company each used more than $10,000 of railroad and telegraph service. Even then it would be objectionable because it would be a half rate for the excess paid for by one to the other. There is a more serious objection, namely, that in the actual operation of these railroad-telegraph contracts the fixed, specified amount of the service is often not used up by one or both of the parties and then absolutely free service results. For illustration, the record in the Great Western case now at bar shows that the Postal Company received from the railroad company in 1915 railroad service to the amount of $3,680.40 while the railroad company received from the telegraph company telegraph service to the amount of $9,100.04. The difference was not paid for at all, either at half rates or any other rate. It was free service pure and simple. The record in the Baltimore & Ohio case now at bar does not show how much telegraph service the railroad used nor how much railroad service the telegraph company used, and the above quotation from the opinion of the Circuit Court of Appeals shows that that court did not fully understand the exact situation. To illustrate further, if under that contract the Western Union used $7,000 of railroad service and the railroad used $17,000 of telegraph service, the railroad company paid half rates for $7,000 of

telegraph business and nothing at all for $10,000 of telegraph service, excepting so far as that $10,000 is offset by $7,000 of railroad service furnished to the telegraph company. On the other hand, if the telegraph company received $7,000 of railroad service and the railroad company received $9,000 telegraph service, there was $2,000 of free service to the railroad. If the record in the Baltimore & Ohio case now at bar had stated fully, the same as the record in our Chicago Great Western case states fully, the exact amount of service rendered by each company, the Circuit Court of Appeals would have had the facts and situation fully before it.

That Baltimore & Ohio contract seems to have been selected (the same as several years ago) as the most favorable contract to upset the ruling of the Interstate Commerce Commission.

The Circuit Court of Appeals said:

> "If it were shown that this contract or any other agreement, were being used as a cover for injuring one party or the public, other rules would apply. Nothing of the kind being suggested, the decree is affirmed."

No suggestion was made to that court by either party that this so-called exchange of free service was contrary to public interest.

The record in the Baltimore & Ohio case does not fairly present the questions, as is apparent from the following quotations from the bill *which are admitted by the answer*:

> "That upon said system of telegraph lines defendant has nearly 25,000 offices, about 20,000 of said offices being railroad offices yielding rev-

> enues too small to pay for maintenance, separate and apart from the advantages derived from contracts with railroad companies as hereinafter referred to, and which, but for such contracts, could not be maintained as independent telegraph offices, and would not, therefore, afford telegraphic facilities to the public." (Tr. *W. U.* v. *B. & O.* 17.)

The record in the Postal-Chicago Great Western case shows that the railroads could and would maintain telegraph service at its depots without a telegraph contract and that, in fact, the Pennsylvania Railroad, the Chicago, Milwaukee & St. Paul and the Canadian Pacific, actually do transact a commercial telegraph business on their own account at their depots. (Tr. *Postal* v. *C. G. W. R. R.* 76.)

The following is another quotation, namely, that these railroad-telegraph contracts

> "have enabled the telegraph companies not only to offer commercial service in districts and at thousands of points where otherwise it would have been impossible except at prohibitive rates." (Tr.—*W. U.* v. *B. & O.* 17.)

Here, too, experience has shown that this is not true. That bill in equity further alleges that if this telegraph service was not furnished to the railroads the latter

> "would be compelled, as operating necessities, to construct and maintain for themselves, not only telegraph lines along their respective rights of way, but also telegraph lines between their principal termini, junction points and other important stations and commercial centers throughout the United States not directly served by such railroads." (Tr.—*W. U.* v. *B. & O.* 19.)

That proposition is absurd on its face, because a railroad can pay regular rates to a telegraph company for service to different parts of the United States, the same as a manufacturing company or an individual pays them.

Then there is an allegation in that bill of complaint,

> "that for the reasons aforesaid the destruction of such contracts would seriously injure the public service of the telegraph companies, not only as to the efficiency of such service, but also as to the rates at which it could be furnished." (Tr.—*W. U.* v. *B. & O.* 21.)

That is not a correct statement. The telegraph service given by the Pennsylvania Railroad today at its railroad stations on its own account and by the Chicago, Milwaukee & St. Paul and by the Canadian Pacific, does not injure the efficiency of public service of the telegraph company.

Then there is another allegation that the upholding of this ruling

> "would produce chaos in the business and operations of your orator's said railroad system and would disrupt and disorganize the same, and would prevent the efficient, safe and proper operation of its trains and the proper discharge of its duty to the public." (Tr.—*W. U.* v. *B. & O.* 23.)

We fail to see how the Baltimore & Ohio Railroad System would be in chaos if it had to pay for its telegrams to different parts of the country on its railroad business, the same as other corporations and individuals pay.

Such are the allegations admitted by the answer

in this suit of the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company.

These and other equally unwarranted allegations sustained only by admissions in the answer of defendant are responsible largely for the result in that case. And the Court of Appeals for the Seventh Circuit merely followed, in the Postal case, the decision in the B. & O. case. So that little weight attaches to the decisions of the lower courts, especially in view of the careful presentation of the issues in the records of the Great Western and Tonopah R. R. cases and particularly the former.

THEORIES ON WHICH IT IS PROPOSED TO SUSTAIN THE RULINGS OF THE COMMISSION.

The Postal Company maintains that the holding of the Interstate Commerce Commission is right upon the following theories:

1, That the original Commerce Act and all of its amendments were designed to protect the public against unjust and discriminative rates and against all preference and privilege, and the Act should be construed liberally for the protection of the public.

That constructions of a statute should be adopted which in the light of the history of legislation best comports with the genius of our institutions, and therefore most likely to have been the construction intended by the law making power.

Texas & Pac. Ry. v. *Interstate C. C.*, 162 U. S. 218.

2. The Act of 1906 specifically excepted as to passes linemen of telegraph companies, thereby limiting the working agreements then existing between railroad companies and telegraph companies; and the ruling of the Interstate Commerce Commission that transportation of men and material for joint operating services was *permissible*, and transportation of men and material for telegraph companies under such circumstances as to amount to giving its utility services as a public carrier for other consideration than provided for in its published tariffs, was *prohibited*, was in accordance with the spirit of the Act.

When a statute is substantially re-enacted after its provisions have received judicial interpretation, it is regarded as having been adopted with knowledge of such construction and with the intention that it should thereafter be interpreted in the same way.

The "Abbotsford," 98 U. S. 440.

3. The Amendment of 1910 was passed in view of the construction already placed upon the Act, by the Interstate Commerce Commission and the courts, and should be so interpreted.

Interstate C. C. v. *B. & O. Rd.*, 145 U. S. 284.
McDonald v. *Hovey*, 110 U. S. 619.

A proviso in a statute where the enacting clause is general in its terms and objects, is to be construed strictly. The proviso carves special exceptions out of the enacting clause, and those who set up any special exception must establish it as being within the words as well as within the reason thereof.

U. S. v. *Dickson*, 15 Pet. (40 U. S.) 141, 165.

4. By the phrase "exchange of services" between telegraph companies and carriers, as used in the Act, was meant operating services as distinguished from utility or commercial services, and it was put in the Act with a view of not disturbing the joint convenience enjoyed by such companies. The phrase as used means "working agreements," between the parties.

The practical construction placed upon the statute by an administrative body charged with its enforcement is entitled to great respect and accepted unless there are cogent and persuasive reasons for departing from it.

U. S. v. *Moore*, 95 U. S. 760, 763.
Hastings, etc., Rd. Co. v. *Whitney*, 132 U. S. 357, 366.
Heath v. *Wallace*, 138 U. S. 573, 582.

5. The spirit of the Act in requiring utility or commercial services to be paid for in money places the burden of sustaining each utility upon the shoulders of its own patrons; otherwise, as the record discloses, patrons of the Postal Company must bear the operating expense of transmitting seven or eight thousand dollars' worth of telegrams per year for railroad telegraphing to the relief in the same amount to the patrons of the Great Western Company.

Public carriers of interstate commerce have no inherent right to privately contract for the sale or exchange of the commodity, utility or commercial service rendered the general public, as against the constitutional power of Congress to regulate inter-

state commerce. Any contract ante-dating the enactment of the Interstate Commerce Act or its amendments so providing, is abrogated and annulled by that Act so far as such contract contravenes the spirit of the Act.

L. & N. R. Co. v. *Mottley*, 219 U. S. 467.

6. The context of the contracts when examined will show there is no "exchange" of utility services within the meaning of that word. There is a sale of so much utility service (without regard to published rates) or the gift of so much utility service, or free telegraphing or free transportation (figured at public rates). The contracts require a record to be kept of the amounts,—so much per mile or per year. The amounts are computable.

A public utility doing an interstate commerce business may not be made a favored patron by another such utility and given lower rates and preferred service over its other patrons.

Int. Com. Comm. v. *B. & O. R. R.*, 225 U. S. 326.

7. Congress did not intend to disturb, but on the contrary to preserve the solidarity existing between railroad companies and telegraph companies, so far as joint operating facilities was concerned.

It is not the relationship of one public utility to another which was intended to be regulated by the Interstate Commerce Act, but it is the relationship of carriers to their patrons who are entitled to equality of charges. The term "exchange of services" contained in the proviso should be interpreted in view of this rule.

Penn. R. Co. v. *I. C. M. Co.*, 173 Fed. 1.

8. The exception made in the Act to telegraph and railroad contracts extends no further than the reason for it and cannot be read so as to permit practices against the spirit of the Act, where there is an interpretation open and patent which maintains the spirit of the Act and at the same time preserves the joint operating rights of the parties.

It is not within the province of the carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured.

Int. Com. Comm. v. *D. L. & W. R. R. Co.*, 220 U. S. 235, 251.

9. An arrangement for free or reduced carriage for necessary materials and men used in connection with construction or improvement of a railroad, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from published tariffs for the reason that such an agreement lies outside the policy of those provisions.

Sante Fe Ry. Co. v. *Grant Bros.*, 228 U. S. 177.

10. The rulings of the Commission upon the practical application of the Act are entitled to weight, where there is some doubt in the wording of the law.

The more the records in these cases are studied the more one is impressed with the need of commerce regulation. All of the selfishness of a privately owned public enterprise seems to pervade the records, and without real reason or logic. It is no longer necessary that public utilities, which are now engaged in interstate commerce and which

are protected by the Interstate Commerce Act, should drive hard bargains for commercial service with other similar utilities. Their dividends and their investments are protected by the application of just rates and practices established or maintained by the Interstate Commerce Commission.

But the fight on the Interstate Commerce Act by entrenched privilege and favortism has filled the books with a multitude of cases which make a sordid story of opposition to public justice. It is refreshing, however, to note the continued progressive action of Congress and the steady hand with which this wholesome legislation has been upheld by administrative officers and courts of justice.

And it seems so long as two possible constructions have been open upon any phase of the Act in question, selfishness has clung to the last spar and grasped at the last straw.

The Interstate Commerce Act was passed in 1887, and was aimed against rebates and unjust discriminations and provided penalties against carriers, but not against shippers. Two years later the Act was amended so as to provide penalties against shippers also. Shippers having refused to testify before the Interstate Commerce Commission, Congress passed and amendatory act in 1893 protecting witnesses from prosecution on account of any matter about which they should be required to testify. In 1903 the scope of the Act was extended authorizing injunctions, and prescribing increased penalties for departures from public tariff rates. A series of exposures and investigations disclosed the most ex-

tensive and flagrant discriminations and rebates. Congress then passed the Hepburn Bill which was approved June 29, 1906. The power of the Interstate Commerce Commission was increased and that body given authority to prescribe future just and reasonable rates and regulations, whenever the present rates are found unjust and unreasonable. It brought other interstate business enterprises under its jurisdiction, including pipe lines, sleeping cars, and express companies. The Act contained the so-called Commodity Clause forbidding railroads to carry any commodity other than timber and its manufactures in which the roads had a financial interest, except only so much as might be intended and necessary for their own use. This feature of the Act was aimed at railroads which owned and operated coal mines and oil fields, and the discriminations which had been practiced by them under cover of such ownership.

In June, 1910, the Act was further amended empowering the Commission to suspend the operation of tariffs, providing increased rates subject to investigation to determine their reasonableness and propriety. This provision was for the prevention of transportation wrongs before they should be committed. Jurisdiction and authority over telegraph and telephone lines was conferred upon the Commission, and the Commission empowered to make suitable orders in the same manner as if formal complaint had been made by shippers.

Congress also has passed many other Acts akin to the Interstate Commerce Act, which includes legislation to promote the safety of employees and trav-

elers upon interstate railroads by compelling safety appliances; requiring interstate carriers to report all accidents upon their lines; providing for the arbitration of disputes between employers and employees; compelling and regulating the inspection of boilers; limiting the hours of service of employees of interstate railroads and preventing cruelty to animals while in transit.

The attitude of Congress toward interstate commerce has been a progressive one, and at no time since the passage of the original act regulating interstate commerce has Congress taken a backward step.

The interpretation sought to be placed upon the proviso in the 1910 Amendment in the cases at bar by the defendant railroad companies is one which ascribes to Congress a desire to depart from the provisions of the Act of 1906 and from the interpretations placed thereon by the administrative body charged with the enforcement of the law and the interpretations of that law by the courts. The position of the defendant railroad companies is that the proviso in the 1910 Amendment, permitting railroad companies and telegraph companies to enter into contracts for the exchange of services, puts those companies out of the operation of that law so far as their inter-relations are concerned.

The question to be decided in these cases is whether Congress took a step forward or a retrogressive action when it brought telegraph companies under the Act to Regulate Commerce, and inserted the proviso in question.

Early in the history of railroading the telegraph became an operating convenience and necessity. The scheme of tying the various railroad telegraph systems together and superimposing thereon a commercial telegraph system was put in effect by the type of contracts shown in these records.

There is a real economy in the practice of joint operation of the railroad and commercial telegraph. All of the business centers are located on railroads and their rights of way form natural highways for the stringing of telegraph wire from city to city. Their routes are the most direct. Both railroads and telegraphs must use poles and similar accessories. Co-operation of the two systems, so far as joint use and operation is concerned, is a natural economy.

The joint conveniences of these two utilities should not be disturbed. They should be enjoyed—enjoyed for their mutual help—not for enrichment of one at the expense of the other.

Such mutual profit as is obtained by such joint operation should be for the benefit of all patrons and not at the expense of one set of patrons and the profit of the other.

In 1906 the Hepburn Amendment was passed, aimed particularly at the vice of free transportation of persons and materials. Under this act linemen were excepted from the restrictions as to passes. This exception, as construed by the Interstate Commerce Commission, affirmed by the Circuit Court of the United States (see page 20, *supra*) was confined strictly to linemen while engaged in telegraph work

on that particular railroad and not when en route to some other telegraph line. In the latter case it was held to be commercial railroad business for which a money consideration was to be paid.

The telegraph companies were not then under the act and their part of the contract, so far as their right to give away their commercial services was concerned, was outside of the act.

The railroads and telegraphs lived under this ruling until 1910, when the act was amended so as to include telegraph companies within its operation.

Had Congress in the 1910 Amendment merely placed the telegraph companies under the Act and said nothing about railroad-telegraph contracts, no one would doubt but that the ruling of the commission would be held to apply to telegraphs as well as to railroads and that telegraph companies must charge their public rates to the railroads for their commercial business regardless of their private contracts for free service with railroad companies, the same as has been upheld by the court as to railroads. (*Mottley Case*, 219 U. S. 467.)

But Congress used some language for the protection of both telegraphs and railroads in their amendment by way of a proviso which has been seized upon by selfish suggestion and "used as a handle," as Blackstone says, to preserve the ancient vice of service without price. After a generation of fighting against privilege and preference the railroads in the cases at bar claim that Congress deliberately took a step backward and deserted its steadily blazed pathway of progress; their contention is that Congress

has said by the proviso that railroads may pass and transport free any lineman or material of a telegraph company regardless of destination or origin, and telegraph companies may continue to transmit commercial messages free or at reduced rates in such quantities as are filed for transmission by railroad companies; and this regardless of the prior provision which says that their charges shall be just and reasonable and the same for all.

It must be presumed that Congress knew the interpretation placed upon the Act by the Interstate Commerce Commission, as that commission had made two reports advising Congress of the rulings made upon these very railroad-telegraph contracts here in question. So Congress knew when it passed the 1910 amendment that the commission had held that telegraph companies should have free transportation only so far as used on the line of the particular railroad, and that the ruling of the commission was that when the reason of that rule should fall free transportation should fall with it. And Congress knew that if the provisions as to passes and free service remained unchanged except as to a limited exchange of service the abuses of free service as defined by the ruling of the commission would cease to apply to the telegraph companies as it had to the railroads. When the telegraphs were brought under the act their telegraph business for the railroads, other than the telegrams between two points on the railroad, were brought back to a money basis, the same as railroad and express business, because every act of Congress on the subject from the beginning in 1887, and every decision of this court

has been to that effect, and, indeed, it is difficult to see how the railroad companies can get away from the decisions of this court as to collecting cash from the telegraph companies for all railroad service, except for the transportation of telegraph men and material for use on the railroad itself, and hence if such be the law as to the railroads the amendment of 1910 should be construed as establishing the same law for the telegraph companies.

The principle and policy of the act is that no utility subject to the act may prefer any one over others of the public. If railroads may not give transportation free, then telegraphs may not give telegraphic service free. No particular sacredness attaches to the business of railroading or telegraphing that would entitle them to be preferred over the public.

One of the fallacies in the position of the railroads in this matter is that they construe the Interstate Commerce Act to have been passed in their favor, for their protection, and urge that as a basis of interpretation of the proviso in question. Their position is wrong. The proviso was not intended to protect favoritism and privilege as against the public, but to protect only those rights in their contracts which stipulate for the conveniences of joint operating services. These operating services would in some instances rank as commercial services, but for these contracts, and would have to be paid for at public rates; but by virtue of the contract these services become a part of the operation of the utility itself, and hence the proviso excuses a money consideration.

The reason of the proviso is apparent. It is a

restriction upon the courts and the commission, intended to prevent services (which but for these contracts would be commercial service), from being construed as within the rule requiring a money consideration.

The contention that the proviso gives unbridled rein to railroads and telegraphs to contract away their commercial services without charge is not within the reason or logic of the circumstances. The meaning of the phrase "exchange of services" must be sought in light of the circumstances, facts and history of the legislation. In view of all the circumstances, we conclude that "exchange of services" means "operating services" as distinguished from "commercial services."

That this construction is the true one becomes apparent when we observe what would be the condition of the telegraph company and railroad company having no operating agreements with each other; they are at once discriminated against, if their competitor may have the free use of a railroad or a telegraph as the case may be.

The construction here contended for—that Congress meant "operating services" rather than all kinds of services—best comports with the spirit of our times. An equal share of the common burden and an equal opportunity in life is the modern trend of things and the policy of our legislation. To construe the proviso as an enlargement upon the act would be to fly in the face of the spirit of the law and all legal intendment.

There is a further viewpoint. The record shows

that the Great Western gets about $8,000 worth of free telegraphic service a year over and above what it would get for hauling men and material for the Postal Company. This cost of handling this service is born by the patrons or that part of the public which supports the Postal Company, to the profit of the patrons of the Great Western Railroad. This is clearly against the spirit of the law. Those utilities under the act are protected in their just rates and they do not have to drive hard bargains with other utilities in order to live. Regardless of the loss of their free service under these contracts, Congress has given them the basis of a clean, independent business life free from favor to others or the necessity of favors from others. Clearly Congress woud not put them in this favored position and yet permit them to maneuver from this safe base of operations and exact privilege and give preference to the detriment of the public. Being put by Congress in a position where all must pay them their just charges, it is only common justice that railroads and telegraphs should also pay their own way.

Under the present government operation of both railroads and telegraphs where the receipts from both sources and also expenditures are controlled by the government, the time is opportune to settle this matter in accordance with the spirit of the act and wipe out discriminations at this time when it may be done without inconvenience to the public or loss to either railroads or telegraphs during the process of readjustment of relations.

THE SPIRIT OF THE ACT.

There has never been a time in legal history when the letter of a law has been given force over the spirit of the Act. The books abound with apt examples. The presumption is that the lawmaking body never intends to make an unnecessary change in the law. The intention of the legislators when manifest on the face of the statute, or when clearly ascertained by its setting in the circumstances and legal history, is the law, although it may not be consistent with the exact import of the language used.

An illustrative case is found in Rector, etc., of *Holy Trinity Church* v. *United States*, 143 U. S. 457, which involved the construction the "Alien Contract Labor Law," which prohibits the importation into this country of any foreigner under contract to perform "labor or service of any kind." It appeared in that case that a clergyman, an alien residing in England, came to this country under contract to enter the service of a church as its rector. The case was made on an action to recover the penalty provided by the Act. This court said:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and was pressed upon the attention of the legislative body. * * * It is the duty of the courts, under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

That the abolition of discrimination in rates of common carriers is the purpose and spirit of the Act in question admits of no debate.

On July 15, 1915, the Interstate Commerce Commission made a report on the subject which is of much interest in determining the purpose of this commerce legislation and as showing how evasions of the act on the part of railroads cost the traveling public and shippers millions of dollars a year. This report is in part as follows (Tr. 72, *Postal* v. *C. G. W. R. R.*):

> "The practice of granting free transportation of passengers and private cars, although less general than formerly, *in part because of prohibitory legislation upon that subject*, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by carriers. It appears from the commission's compilation of the answers to the questions addressed by it to the carriers that there were issued during the eleven months ending November 30, 1913, by 78 of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of 482,709. These trip passes represented 88,575,298 passenger miles.
>
> June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger miles.
>
> The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger mile in official classification territory in 1913 the passenger miles represented by trip passes alone would have yielded in passenger revenue $18,520,000.

"Some of these passes were no doubt issued to employees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

"Compilations prepared by the Commission show that the revenue from private cars handled free during the year 1913 on eighty-eight of the roads which have made answer to our question would, at tariff rates, have amounted to $644,250.79.

"But the direct cost and revenue loss attendant upon the present practice are less serious than is its demoralizing effect. It is natural that subordinates should be wasteful when their superiors are extravagant; and that efforts to secure economies should often prove futile when, at the expense of stockholders or the public, the luxury of a private car is freely granted for personal and private use to officers and directors or even to subordinate officials and members of their families. The record of one of the railroads most prominent in the appeal for a freight rate advance discloses such liberal grant of free transportation of private cars, not only to directors and officers of other independent railroads, but to lesser officials of such carriers and to members of their families. Among the beneficiaries were the wives of first, second and third vice-presidents, the wife of a superintendent, the wife of a superintendent of telegraph, the mother of a chairman, the secretary of the vice-president of a telegraph company, and the chief clerk to a president. Indeed,

> not a private car merely, but two special trains were furnished free to the widow of a former director, the tariff rate for which service would have been $3,466. The wife and daughter of the president of that company enjoyed in a single year free transportation in private cars for nine trips on which the tariff rates would have aggregated $3,577." (Tr. *Postal Tel.-C. Co.* v. *Tonopah, Etc.*, R. R. 123.)

This is the evil sought to be removed by the Commerce Act, and when telegraphs are allowed to give free telegraphing to railroads, the patrons of the telegraphs are being made to help bear the expense of those who travel.

In the case of *Express Companies* v. *United States*, 212 U. S. 522, which arose under the Hepburn Amendment to the Interstate Commerce Act, it was sought to extend the privilege of permitting express companies to give free transportation of packages to its employees on the theory that such had long been the custom and was presumably known to Congress. The contention was that inasmuch as express companies were common carriers they were entitled to the same privileges as the law gave to railroads under the proviso permitting free franks and passes. As originally reported the Bill did not apply to express companies, but contained the proviso. Later the Bill was amended to include express companies, and the proviso remained unchanged and escaped notice. The court ruled that although express companies were within the term "carriers" they were not within the meaning or spirit of the act. Quoting from a prior case the court said:

> "The all embracing prohibition against either

directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

In the case of *Santa Fe Railway* v. *Grant Bros.*, 228 U. S. 177, it appeared that the railroad had made a contract with Grant Bros. to do some construction work and, in consideration of a reduced rate for carriage of the men and materials, all risk of loss or damage was to be borne by the contractor. It was contended that railroads could not thus limit their liability. The court held that the facts took the case out of the rule which prohibits a common carrier from contracting away its liability as a carrier. The court said:

"Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. * * *

"It is clear that in dealing with transportation of this character over its own road, in con-

> nection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Re Railroad-Telegraph Cos.*, 12 Inters. Com. Rep. 10, 11."

The Santa Fe case above referred to has a peculiar application to the case at bar in that it presents a state of facts falling clearly within the legislative intention when the proviso in question was adopted. The spirit of the 1910 amendment was to enable railroads and telegraph companies to enjoy contracts for joint operation in which each would be rendering the other a service which, but for the contract, it would have to do for itself or pay for at the current price. The sound business sense view taken by the Interstate Commerce Commission in its ruling upon railroad-telegraph contracts was apparently noted by this court as it cites with approval the administrative ruling of the commission which is here involved, a fact not without interest in this case. (228 U. S. 188; citing 12 I. C. C. Rep. 10, 11.)

In light of all the circumstances under which the original act and its several amendments were passed, it seems clear that Congress did not intend that railroads and telegraph companies should revert to the very practices against which it had turned its face for a quarter of a century. Courts have never permitted the purposes of laws to be defeated by the

ues of inadvertent expressions, ambiguous terms or unfortunate language where the manifest intention is stamped upon the record.

THERE IS NO HARDSHIP IN ENFORCING THE RULING.

There will arise no hardship to either the railroads or telegraph companies, if the ruling of the commission and the spirit of the Act are upheld. The Western Union contract with the B. & O. provides for free service to the extent of Ten Thousand Dollars ($10,000) shall be accorded each to the other in commercial business, that is off-line service, and half rate over that figure. The contract provides that the Western Union shall issue:

> "Annual franks authorizing the free transmission of messages * * * beyond or off the line of said railroads to an amount not exceeding $10,000.00 per annum calculated at the regular commercial day rates, * * * and the railroad agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amounts, settlements to be made yearly."

The same contract also provides that the B. & O. agrees to transport men and materials not within the joint operation of the two utilities, but in the general business of the Western Union off the line of the B. & O.

> "to an amount not exceeding $10,000.00 per annum calculated at the current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlements to be made yearly."

With apprehensive foresight the Western Union and B. & O. in paragraph fourteen of their contract stipulated a release of damages each to the other in case any part of their contract should be held invalid for want of legal authority to so contract.

All that is lacking in this contract to make it comply with the spirit of the Interstate Commerce Act is a further provision to the effect that when the yearly settlements are made they shall strike a balance between the amounts of service actually used and the company using the most service pay the other the excess. In other words each pay for the service actually given it by the other.

The free service accorded by their contract is the difference in the amount of *commercial* railroad or telegraph service used. The one using the most service gets the excess free of charge up to $10,000 and half rates for the excess.

The Great Western-Postal contract provides that the Postal Company shall:

> "Transmit free over its lines beyond said railroad telegraph lines, business of the railroad company to the extent of $10.00 per mile of railway per annum, * * * and in case the telegraph business of the railroad company beyond its lines shall amount to more than $10.00 per mile per annum, the excess shall be paid for at one-half the regular rates of the telegraph company."

The corresponding part of the contract obligating the railroad company to give free service is that it agrees to transport:

> "Free of charge over its railway * * * employees of the telegraph company when traveling upon the business of said company."

The provision in the Great Western contract for the transportation by the railroad company of material covers only that material to be distributed along the line, for use in upkeep, etc., of the joint operating equipment.

The Tonopah-Postal contract provides that the Postal shall pay cash for the transportation of its off the line or commercial business in the way of men or material handled by the railroad. But the contract provides that the Postal Company shall transmit without charge commercial or off the line business of the railroad company to the extent of $12 per mile per annum for the first 200 miles of railroad and $10 per annum for each mile over 200, computed at regular day telegraph rates. All telegraphic services over that amount the railroad company pays for at full day rates.

In the Tonopah contract there is no free commercial service to be given by the railroad company of any kind. This contract was drawn in accordance with the ruling of the Interstate Commerce Commission in 1906 (Tr. 34) and is so balanced up that the railroad company cannot lose, that is it does not give free service. At the time this contract was drawn the Postal Company was not under the Interstate Commerce Act and was privileged, so far as that act was concerned, to bargain away its commercial business without a money consideration.

Looking generally over these contracts, the idea clearly presents itself that the commercial business done for each other by these utilities was not an "exchange of services." It was a sale. The price is definitely fixed on all of it. Records are required to

be kept and the balance to be struck is computable in terms of money. The transaction is a sale so far as it goes. Beyond that it is free.

The idea of an exchange is the giving of one thing for another. But to give so much grain at $1 per bushel for so many cattle at $100 per head is strictly speaking a sale. (Webster's Dictionary.) These contracts are, therefore, not within the meaning of the phrase "exchange of services" as used in the Act.

But to sustain the ruling of the commission will not harm either utility. They will be but placed upon equal terms. They may proceed to exchange their operating services (*without keeping any track or account of the amount*) and mutually help each other in their joint undertaking and may readjust their operating conditions to their mutual satisfaction. If anything be lost to either, it will be merely the elimination of a preference over the public. But their loss is the public's gain. And that is the spirit of the law.

THE POST ROADS ACT.

An interesting phase of this question arises in view of the fact that the Telegraph Companies have accepted the Post Roads Act of Congress, passed July 24, 1866. Under this act the government may purchase all the telegraph lines, property and effects so used at an appraised value, to be used for postal, military and other purposes. Under this Act it was held by this court that the Union Pacific Railway could not grant the Western Union Telegraph Company an exclusive right to the use of its right of way which was a post road (160 U. S. 41). If the con-

tracts here in question be held legal, then should the government take over the telegraph lines under the Post Roads Act, it will have to assume the burden of all the free service allowed the railroads under the contracts. Congress surely had no such intention when it included the proviso in question in the Act.

There is an argument contained in the bill filed in the B. & O.-Western Union case, which we will answer here. That argument is that the considerations of railroad contracts are so exactly balanced, interwoven and mutual that the enforcement of the ruling of the Interstate Commerce Commission will thereby destroy and annul such contracts in their entirety and deprive the public as well as the parties of all of the benefits derived therefrom, in the matter of the use and operation of the railroads and in the use of the widespread facilities owned by the telegraph company. This argument is a specious one and gains plausibility only by virtue of the fact that the pleader overlooks entirely the fact that the commercial services which are contracted to be exchanged are measurable in terms of money and are so measured in the contracts. No disorganization of business of either the telegraph company or the railroad company will result, nor will any inconvenience to the companies or to the public whatever result from the enforcement of the rule. The only additional thing required by the rule is that at the end of the year a balance shall be struck between the contracting companies and the balance thereby determined be paid by one to the other.

This is exactly what happened when in 1906 the Interstate Commerce Commission forbade the rail-

roads giving free railroad service to the telegraph companies in accordance with existing contracts, except so far as such railroad service pertained to telegraph men and material used on that particular railroad. The railroads promptly cut off all other free service of the telegraph companies, and disregarded the existing contracts in that respect, and yet nothing happened, and neither party claimed that the entire contracts were void. The remaining portions of the contracts were carried out and there is no reason to believe that there would be any different result if that same rule were now applied to these contracts as to this free service on both sides.

The further argument of the Western Union and Baltimore & Ohio that to uphold this ruling of the Interstate Commerce Commission would deprive the public of the telegraph service at railroad stations is absurd. Nothing of the sort would happen. The railroad would continue to give telegraph service in those depots, and, in fact, would be very glad to do it because the railroad would then keep the telegraph tolls on telegrams between points on the railroad, and a portion of the tolls to outside points, whereas at present the telegraph companies under the usual railroad-telegraph contract get all of such tolls. The testimony of Mr. Baker on this subject is convincing. (Tr. 76.) As to the Western Union and Postal companies being deprived of those tolls, they can well afford to let them go to offset the immense amount of free telegraph service now being given by the telegraph companies to the railroad companies throughout the United States.

For the several reasons shown above the ruling of the Interstate Commerce Commission should be sustained and the decree of the Court of Appeals reversed.

Dated January 6, 1919.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 404

POSTAL TELEGRAPH-CABLE COMPANY,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

	Page
Argument	14
(a) History pertinent to issue	14
(b) As to the language of the act of 1910	20
(c) As to the proviso	21
(d) As to the word "Exchange"	22
(e) As to cable companies	23
(f) As to the right to contract	24
(g) As to relation of the amendment of 1910, with respect to free transportation	25
Conclusion	27
Outline of contract	2
(a) Covenants of appellee	2
(b) Covenants of appellant	3
(c) Mutual covenants	4
Points and authorities	10
Question for decision	9
Statement	1

Table of Cases.

Aldridge v. Williams, 3 Howard, 9	10
American Express Co. v. U. S., 212 U. S., 522	11-21
American Mercantile Exchange v. Blunt, 102 Me., 128	11
Baltimore & Ohio R. R. Co. v. Western Union Telegraph Co., 241 Fed., 162, Aff. 242 Fed., 914	12
Bank v. Owen, 2 Peters, 527	11
Beardsley v. Cottrell & Babcock, 43 Ia., 194	12
Buffum v. Merry, 4 Fed. Cases, 605	12
Chapman v. Hughes, 134 Cal., 641, 657	12
Chicago, I. & L. Ry. Co. v. Southern Ind. Ry. Co., 70 N. E., 843	11
Chicago, I. & L. Ry. Co. v. U. S., 219 U. S., 486	17
Church, etc. v. U. S., 143 U. S., 547	10
Coker v. the State, 8 Southern Rep., 875	12
Cooper v. the State, 37 Ark., 412	12
Elwell v. Chamberlin, 31 N. Y., 611	12
Foley v. Speir, 100 N. Y., 552	11
Forkner v. the State, 95 Ind., 406	12

Georgia Railroad & Banking Co. v. Smith, 128 U. S., 174-181.....11-21
Goodrich, etc. v. I. C. C., 190 Fed., 943..... 10
Haynes v. Rudd, 162 N. Y., 372..... 11
Interstate Commerce Commission v. Baird, 194 U. S., 25-37.....11-21
I. C. C. v. Goodrich, 224 U. S., 194..... 10
Jenkins v. Mapes, 41 N. E., 137..... 12
Jermyn v. Elliott, 45 Atl. Rep., 950..... 12
Kahn v. Wilhelm, 118 Ark., 239; 177 S. W., 403..... 11
Laboree v. Klosterman, 33 Neb., 150..... 12
Lapina v. Williams, 232 U. S., 78..... 10
Long v. Fuller, 21 Wis., 121..... 12
Lowey v. Granite State Provident Assn., 8 Misc. (N. Y.), 319..... 11
Meyer v. Rousseau, 47 Ark., 463..... 12
Moran v. James, 20 Misc., 235..... 12
Platt v. U. P. R. R., 99 U. S., 48..... 10
Red, etc. Co. v. Board, etc., 172 Fed., 695..... 10
Red, etc. Co. v. Board, etc., 222 U. S., 380..... 10
Schwepy v. Stevens, 177 Fed., 484..... 11
St. Paul, M. & M. Ry. Co. v. Western Union Tel. Co., 118 Fed., 497 17
Standard Oil v. U. S., 221 U. S., 1..... 10
State v. Austin, 23 Southern Rep., 34..... 12
Texas & Pacific R. R. Co. v. I. C. C., 162 U. S., 197..... 10
Thomson v. Thomson, 7 Ves. Jr., 470..... 11
Trist v. Child, 21 Wall., 441..... 11
Tucker v. Williamson, 229 Fed., 201..... 10
Union Central Life Ins. Co. v. Berlin, 90 Fed., 779..... 11
U. S. v. Chicago, I. & L. Ry. Co., 163 Fed., 114..... 17
U. S. v. Chicago & N. W. Ry. Co., 157 Fed., 618..... 10
U. S. v. Dietrich, 126 Fed., 671..... 11
U. S. v. Ninety-nine Diamonds, 139 Fed., 961..... 13
U. S. v. Northern Pac. R. R. Co., 120 Fed., 546..... 17
U. S. v. Trans-Mo. Freight Assn., 166 U. S., 290..... 10
U. S. v. Union Pacific, 91 U. S., 72..... 10
U. S. v. Union Pacific, 148 U. S., 562..... 10
U. S. v. Union Pacific Ry. Co., 160 U. S., 1..... 17
Vail v. Strong, 10 Vt., 457-465..... 12
Van Patten v. Chicago, M. & St. P. Ry. Co., 81 Fed., 545..... 13
Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S., 540; 129 Fed., 849 17
Woodward v. Graffenried, 238 U. S., 284..... 10

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 959

POSTAL TELEGRAPH-CABLE COMPANY,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

On December 26, 1888, the Chicago, St. Paul & Kansas City Railway Company, the predecessor of the appellee, and the appellant entered into a contract for the *mutual exchange of services.* (Cont. Tr., 50, 56.)

The Railway Company agreed:

1. To turn over the railroad's telegraph property and system to the telegraph company on January 1, 1889.

2. So far as it legally could, to assure to the telegraph company the exclusive right of way for telegraph purposes on and along its line.

3. To keep clear the right of way of all obstructions to the construction and maintenance of the telegraph lines and wires.

4. To furnish all labor necessary for the maintenance of the telegraph lines.

5. To furnish office room in its railway stations.

6. That its railway telegraph operators should handle the business of the telegraph company at all stations along the line of the railway except at such places as the telegraph company might establish a separate office.

7. That its employees in the performance of their duties in connection with the maintenance and operation of the telegraph lines should observe the rules and regulations of the telegraph company applicable thereto.

8. To transport free over its railway employees of the telegraph company when traveling upon business of the latter.

9. To transport and distribute free along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by the agreement.

10. That (unless legally bound so to do) it would not transport men or materials for the construction or operation of a line of poles or wires or underground or other lines in competition with the lines of the telegraph company, except at and for its regular local rates.

11. That it would not furnish for any competing line

any facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute material therefor at other than regular stations.

The Telegraph Company agreed:

1. To take possession of the telegraph property of the railway company on January 1, 1889, and thereafter,

2. To furnish all materials necessary for the maintenance and repair of said lines.

3. To furnish all apparatus necessary for operating the same.

4. To furnish all blank forms and stationery necessary for the transaction of a commercial telegraph business at all telegraph offices along the line of the railway.

5. If requested by the railway company to promptly construct a telegraph line upon any extension of railway which the railway company might make, and to string thereon two wires for the exclusive use of the railway company, if the business of the latter required it.

6. To pay to the railway company $87,000 in three equal payments of $29,000 on July 1, 1889, January 1 and July 1, 1890, respectively, and to give its promissory notes therefor with interest at 5 per cent. per annum.

7. To transmit free over its lines beyond the railway telegraph lines, business of the railway company to the extent of ten dollars per mile of railway per annum, including any extensions that might thereafter be made, such business to be charged at the regular rates of the telegraph company, and for this purpose,

8. To issue annual franks authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company originating at or destined to points on the telegraph com-

pany's lines within the United States, either upon or off the line of the railway.

9. If the telegraph business of the railway company beyond its lines should amount to more than ten dollars per mile of railway per annum, the excess should be paid for at one-half the regular rates of the telegraph company.

It was mutually agreed:

1. That the business of the railway company should have precedence over all other business upon wires set apart for its use, and that it should have the full use of all wires then in operation and of two wires upon any extensions of railway that might be made in case it should require the same, free of charge.

2. That until the railway company should find it necessary to have the sole use of said wires, the commercial business of the telegraph company should also be done over said wires.

3. If the railway company should require the use of an additional wire or wires for its business over and above the two wires mentioned, the same should be paid for by the railway company.

4. If the telegraph company required an additional wire or wires for its commercial business, the same should be paid for by the telegraph company.

5. In either case such additional wire or wires should come in under the terms of the contract as to maintenance, repairs and renewals.

6. If the two wires or either of them set apart for the use of the railway company should at any time be unfit for use, the railway company should have the free use of such of the wires set apart for commercial business as

should be necessary to transact its business until the wires set apart to it should be put in fit condition for use.

7. That the railway company should not be responsible for any loss or damages that might arise from any neglect or failure in the transmission or delivery of messages.

8. That the railway company should not be liable to the telegraph company for any defalcation or embezzlement of moneys received for the telegraph company by the railway company's operators when such operators were acting as agents of the telegraph company.

9. Nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company while being carried free over the railway.

10. That the telegraph company should not be responsible for any loss or damages arising from or on account of any error, delay or default in the transmission or delivery of any message sent for the railway company under the agreement.

11. That the railway company should have the right to establish telegraph stations at such places along its line as it might deem necessary.

12. That at such stations the telegraph company agreed to supply the instruments, local batteries and blank forms and stationery for local business.

13. That the railway company should have the right to the free use of any patent right or any new discoveries or inventions that the telegraph company then owned or might thereafter own or use in its telegraph business so far as the same might be necessary and convenient for carrying on the telegraph business of the lines of the railway company.

14. That the agreement should be and continue in force for ninety-nine years from its date.

15. That in case of any disagreement concerning the true intent and meaning of any of its provisions, the subject of such differences should be referred to three arbitrators, one to be chosen by each of the parties and the third by the two thus chosen, and the decision of such arbitrators, or majority thereof, to be final and conclusive.

The contract was amended February 5, 1902, by canceling the seventh clause and substituting a clause whereby the telegraph company agreed to transmit free over its lines, beyond the railway telegraph lines, business of the railway company to the extent of $12 per mile of railway per annum. (Tr., 56.)

On the execution of the contract the telegraph company took possession of the telegraph lines of the railway company as provided therein and each party in all respects performed all things required in accordance with its terms until shortly after March 28, 1916, except as here next stated.

After the passage of the Hepburn Act in 1906 and prior to the passage of the Act of 1910, amending the Act to Regulate Commerce, and while the property now owned by the appellee was in the hands of the receiver of appellee's predecessor, the receiver, because of the Act of 1906, refused to transport free under the contract over its lines the employees of appellant when they were seeking to use the same to reach destinations off the line of the appellee.

The propriety of the receiver's interpretation of the contract under the Act of 1906 was questioned in court by the appellant (Tr., 39) and was sustained by an order

of court entered on May 4, 1910. (Tr., 71.) The appellant appealed from the decision. (Tr., 71.) *Within two months thereafter the Act of* 1910 *was passed.*

Section (1) of this act had two paragraphs which have a direct application to the controversy involved. The first paragraph provided:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

The second of these two paragraphs provided:

> "That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carrier subject to the provisions of this act."

Immediately upon the passage of the Act of 1910 the Postal Company abandoned its appeal and both parties readopted the contract in its entirety and continued to adhere to and perform all of its provisions until March 28, 1916. (Tr., 71, 80, 81, 82.)

On June 8, 1912, the Interstate Commerce Commission, in its Conference Ruling No. 364, expressed the opinion that the Act of 1910, had changed the law. It held:

> "Under the Amendatory Act of June 18, 1910, it is provided 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry, *Held,* That a railroad company and a telegraph company may exchange *services with respect to strictly company matters on the basis of their agreement.*"

On March 28, 1916, the Commission reversed its rul-

ing of June 8, 1912, and promulgated the following administrative ruling (Tr., 37):

> "Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar serices; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

Thereupon appellant, pretending to take advantage of this ruling of the Commission, declined thereafter to continue the performance of the contract and immediately began the series of harassing suits referred to in the bill of complaint, relief from which was one of the remedies prayed for. (Tr., 3-9.)

In the District Court a decree was entered dismissing the bill for want of equity. (Tr., 96, 245 Fed., 592.) On appeal of the appellee the Circuit Court of Appeals for the 7th Circuit reversed the decree of the District

Court with instructions to grant the prayer of the bill. (Tr., 110, 249 Fed., 664.)

In view of the position now taken by the appellant the issue is reducible to a single question:

> "May a railroad company, subject to the Act to Regulate Commerce, transport free or at reduced rates employees or property of a telegraph company when such employees and property are engaged and are to be used in the construction and maintenance of 'off line' telegraph facilities, and may such railroad company lawfully accept from the latter the transmission free or at reduced rates of railroad telegrams which are destined to or originate at points beyond the lines of the railroad?"

POINTS AND AUTHORITIES.

I.

UNDER THE AMENDMENT OF 1910, TELEGRAPH, TELEPHONE AND CABLE COMPANIES WERE GIVEN THE UNRESTRICTED RIGHT TO CONTRACT WITH COMMON CARRIERS FOR THE EXCHANGE OF SERVICES. IF, HOWEVER, THERE CAN BE ANY REASONABLE DOUBT AS TO THE MEANING OF THE AMENDMENT, THE COURT WILL RECUR TO THE "PUBLIC HISTORY OF THE TIMES" WHEN THE ACT WAS PASSED IN ORDER TO ASCERTAIN THE REASON FOR, AS WELL AS THE MEANING, OF THE PARTICULAR PROVISIONS IN IT, AND WILL ASSUME THAT CONGRESS HAD SUCH "PUBLIC HISTORY" IN MIND.

U. S. v. *Union Pacific R. R. Co.*, 91 U. S., 72.
U. S. v. *Trans-Missouri Freight Association*, 166 U. S., 290.
U. S. v. *Chicago & N. W. Ry. Co.*, 157 Fed., 618.
Aldridge v. *Williams*, 3 Howard, 9.
Platt v. *U. P. R. R.*, 99 U. S., 48.
Church, etc., v. *U. S.*, 143 U. S., 457.
U. S. v. *Union Pacific*, 148 U. S., 562.
T. & P. Ry. v. *I. C. C.*, 162 U. S., 197.
Red, etc., Co. v. *Board, etc.*, 172 Fed., 695.
Standard Oil v. *U. S.*, 221 U. S., 1.
Goodrich, etc., v. *I. C. C.*, 190 Fed., 943.
Red, etc., Co. v. *Board, etc.*, 222 U. S., 380.
I. C. C. v. *Goodrich*, 224 U. S., 194.
Lapina v. *Williams*, 232 U. S., 78.
Tucker v. *Williamson*, 229 Fed., 201.
Woodward v. *Graffenried*, 238 U. S., 284.

II.

THE CONTRACT IS ENTIRE. THE COVENANTS TO BE PERFORMED ON ONE SIDE ARE INTERDEPENDENT WITH THOSE TO BE PERFORMED ON THE OTHER. THIS BEING TRUE, THE ILLEGAL PART, IF ANY, MAY NOT BE EXPUNGED WITHOUT DESTROYING THE WHOLE STRUCTURE OF THE AGREEMENT.

Trist v. *Childs*, 21 Wall., 441.

Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, 70 N. E., 843.

Bank v. *Owen*, 2 Peters, 527.

Thompson v. *Thompson*, 7 Ves. Jr., 470.

U. S. v. *Dietrich*, 126 Fed., 671.

American Mercantile Exchange v. *Blunt*, 102 Me., 128.

Kahn v. *Wilhelm*, 177 S. W., 403.

Lowey v. *Granite Provident Assn.*, 8 Misc. N. Y., 319.

Foley v. *Speir*, 100 N. Y., 552.

Haynes v. *Rudd*, 102 N. Y., 372.

Schwepy v. *Stevens*, 177 Fed., 484.

Union Central Life Ins. Co. v. *Berlin*, 90 Fed., 779.

III.

A PROVISO OFTEN EXTENDS RATHER THAN LIMITS LEGISLATION.

Georgia R. R. & Banking Co. v. *Smith*, 128 U. S., 174-181.

Interstate Commerce Commission v. *Baird*, 194 U. S., 25-37.

American Express Co. v. *United States*, 212 U. S., 522.

IV.

THE WORD "EXCHANGE" (IN THE PROVISO OF THE ACT OF 1910) MEANS TO GIVE ONE THING FOR ANOTHER, WHATEVER IT BE, EXCEPT MONEY, IN THE LATTER CASE IT WOULD BE A SALE.

Civil Code of Louisiana, Article 2660.
Civil Code of California, Par. 1804.
Civil Code of North Dakota, Par. 6003.
Civil Code of South Dakota, Par. 1348.
Civil Code of Montana, Par. 5129.
Buffum v. *Merry,* 4 Fed. Cases, 605.
Coker v. *the State,* 8 Southern Rep., 875.
Cooper v. *the State,* 37 Ark., 412.
Meyer v. *Rouseau,* 47 Ark., 463.
Chapman v. *Hughes,* 134 Cal., 641, 657.
Forkner v. *The State,* 95 Ind., 406.
Beardsley v. *Cottrell & Babcock,* 43 Ia., 194.
State v. *Austin,* 23 Southern Rep., 34.
Laboree v. *Klosterman,* 33 Neb., 150.
Moran v. *James,* 20 Misc., 235.
Elwell v. *Chamberlin,* 31 N. Y., 611.
Jenkins v. *Mapes,* 41 N. E., 137.
Jermyn v. *Elliott,* 45 Atl. Rep., 950.
Vail v. *Strong,* 10 Vt., 457, 465.
Long v. *Fuller,* 21 Wis., 121.
Baltimore & Ohio R. R. Co. v. *Western Union Telegraph Co.,* 241 Fed., 162, affirmed, 242 Fed., 914.

V.

EVERY WORD OF THE STATUTE MUST BE GIVEN EFFECT PROVIDED IT DEVELOPS NO INTERNAL CONTRADICTION IN THE LAW AND DOES NOT THWART THE OBVIOUS INTENTION OF THE LEGISLATURE.

U. S. v. *Ninety-nine Diamonds*, 139 Fed., 961.

Van Patten v. *Chicago, M. & St. P. Ry. Co.*, 81 Fed., 545, 547.

ARGUMENT.

I.

UNDER THE AMENDMENT OF 1910, TELEGRAPH, TELEPHONE AND CABLE COMPANIES WERE GIVEN THE UNRESTRICTED RIGHT TO CONTRACT WITH COMMON CARRIERS FOR THE EXCHANGE OF SERVICES.

THE ATTEMPT TO READ INTO THE ACT THE WORDS "OFF LINE" OR "ON LINE" IS NOTHING MORE OR LESS THAN AN INEXCUSABLE INTERLOPATION OR ATTEMPT TO LEGISLATE BY THE COMMISSION.

IF, HOWEVER, THERE CAN BE ANY REASONABLE DOUBT AS TO THE MEANING OF THE AMENDMENT, THE COURT WILL RECUR TO THE "PUBLIC HISTORY OF THE TIMES" WHEN THE ACT WAS PASSED IN ORDER TO ASCERTAIN THE REASON FOR, AS WELL AS THE MEANING, OF THE PARTICULAR PROVISIONS IN IT, AND WILL ASSUME THAT CONGRESS HAD SUCH "PUBLIC HISTORY" IN MIND.

By the Amendment of 1910, Congress gave to telephone, telegraph and cable companies the right to contract with common carriers for an exchange of services. In the act, there is no qualification, limitation or restriction of the terms used. The meaning is clear, definite and certain.

If, however, we are in error as to this and there should be any reasonable doubt as to the meaning of the enactment and its purpose, the historical situation existing at the time of its passage, becomes important. This history is as follows:

1. The Act to Regulate Commerce was passed in 1887.
2. In 1906, Congress amended Section six thereof. As

amended, Section six provided, among other things, as follows:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges, upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge, or demand or collect, or receive a greater or less or different compensation for such transportation of passengers or property, * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

3. In September, 1906, the Commission interpreted this provision of the act to mean that only money might lawfully be received in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith. (Conference Ruling No. 207, Tr., 30.)

4. In October, 1906, the Commission held that the law of 1906 did not prevent a carrier from giving free or reduced rate carriage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of that carrier. (Conference Ruling 208, Tr., 31.)

5. On December 21, 1906, the Commission in its report *"In the Matter of Railroad-Telegraph Contracts"* (12 I. C. C., 10) (Tr., 33), held that a telegraph service along the right of way of railroads was a necessary part of the latter's equipment and essential to its safe operation.

The Commission then said:

> "The Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads

> are *sui generis* and unlike any other contracts with carriers that have come to our attention. *So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.* Nevertheless, the Commission knows of no provision of the law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers." (Italics ours.)

The Commission further held that "such contracts with telegraph companies may lawfully be entered into," by railroad companies, and that in consideration of the construction, maintenance and operation of the telegraph line upon the right of way, which telegraph line the railroad company would otherwise be compelled, as an operating necessity, to construct and maintain, the carrier may accord to the telegraph company free or reduced rate transportation for the men, materials and supplies of the telegraph company required and necessary in connection with the construction, maintenance and operation of the telegraph lines upon such carrier's own right of way.

6. On June 3, 1907, the Commission promulgated its Administrative Ruling (No. 219) with respect to "Transportation of Men or Property for Telegraph Companies," in which it referred to and amplified such previous rulings and decisions. (Tr., 31.)

7. On November 15, 1907, the Commission announced that Administrative Ruling No. 219 would apply to telephone service, and called upon carriers that had not already done so to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (Tr., 32.)

8. Existing contracts between the various railroad companies and telegraph companies for the exchange of services were then filed with the Commission. (Tr., 73.)

9. The Commission, from time to time, in its annual reports, reported to Congress the rules and decisions above referred to. (Tr., 34, 36.)

10. In July, 1908, the United States Circuit Court for the Northern District of Illinois, Eastern Division, in *United States* v. *Chicago, I. & L. Ry. Co.,* 163 Fed., 114, held that only money might lawfully be received in payment for transportation. The case was subsequently affirmed by this court (219 U. S., 486).

11. The Congress also had recognized in legislation dating back as far as 1862 the close and necessary relation existing between railroads and telegraph companies and the fact that telegraph facilities are essential to the operation of railroads.

Pacific Railroad Act of July 1, 1862, 12 Stat., at Lg. 489.

Texas & Pacific Railroad Act March 3, 1872, 16 Stat. at Lg. 573.

The Act approved March 2, 1889, 30 Stat., at Lg. 990.

The Act of February 28, 1902, 32 Stat., at Lg. 43.

12. Contracts of the character herein involved had also been the subject of examination by the courts.

U. S. v. *Union Pacific Ry. Co.,* 160 U. S., 1.

St. Paul, M. & M. Ry. Co. v. *Western Union Telegraph Co.,* 116 Fed., 497.

U. S. v. *Northern Pacific R. R. Co.,* 120 Fed., 546.

Western Union Telegraph Company v. *Pa. R. R. Co.,* 195 U. S., 540.

Western Union Telegraph Co. v. *Pa. R. R. Co.,* 129 Fed., 849.

13. It had likewise been a matter of common knowledge that railroad companies required and enjoyed unlimited telegraphic service in the operation of their railroads and the telegraph companies enjoyed the use of the rights of way of the railroad companies throughout the country for the construction and maintenance of their lines, and that in small places the only telegraph service afforded to the public was that furnished at railroad stations.

There is no room for doubt but that Congress was familiar with and had all the foregoing history in mind when it passed the Amendment of 1910. Every railroad in the United States had a contract similar to those presented to the court in the cases at bar. The validity of such contracts had never been questioned prior to the Act of 1906. The legality of the exchange of so-called "on line" services had never been questioned even after the Act of 1906 and still obtained when the Act of 1910 was passed. The Commission had ruled ("*In the Matter of Railroad-Telegraph Contracts*") as to "off-line" services, as follows:

> "So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely." (Tr., 33.)

But because of the Act of 1906 the *full performance* of such contracts had been suspended temporarily pending litigation. This was the situation when the amendment of 1910 was adopted, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

The practical interpretation placed on this amendment

immediately after its adoption is at least persuasive, if not conclusive.

The litigation between the Western Union Telegraph Company and the Baltimore & Ohio Railroad Company in the Second Circuit, involving the question whether the Act of 1906 invalidated in any respect existing contracts, was abandoned.

The litigation involving the same question in the Seventh Circuit, which was on its way to this court, was abandoned. Both railroads and telegraph companies assumed that the Act of 1910 had removed all doubt as to the legality of these intercorporate contracts.

The performance of such contracts, which had been temporarily interrupted pending litigation after the Act of 1906, was immediately resumed. Such operation had been in full force and effect for two years when the Commission gave the sanction of its approval to this practical interpretation by its conference ruling 364, which is as follows:

> "Under the amendatory Act of June 18, 1910, it is provided 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry, Held, *That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.*" (Italics ours.)

So the matter remained as between the railroad companies and the telegraph companies until, for some reason beyond the ken of any human mind, the Commission reversed itself.

II.

THE CONSIDERATION OF THE AMENDMENTS CONTAINED IN THE ACT OF 1910.

(a) *As to the Language of the Act:* In considering this subject one is immediately confronted with the fact that here is no room for interpretation. The act, for the first time in the history of the country, subjects telegraph, telephone and cable companies to the provisions of the Act to Regulate Commerce and designates them as common carriers. It then provides that the rates of transportation to be charged by all common carriers shall be just and reasonable and then, in express terms, provides that the act shall not be construed to prevent telephone, telegraph and cable companies from

> "entering into contracts with common carriers for the exchange of services."

The phrase "entering into contracts" is unlimited in its scope and is as broad as the power to contract. Nothing is said about "on line" or "off line" or "in the air" or "under the ground." Wherever or whenever common carriers engage in the performance of a service for each other, they are permitted under the terms of the act to exchange such performance each with the other without limitation as to place, price or volume.

Not only so, but by the express terms of the act, it is provided that the act shall not be construed so as to prohibit the privilege of

> "passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such cable, telegraph and telephone companies" (irrespective of the basis of exchange) "with the officers, agents and employees and their families of other common carriers."

With such language injected into an act by an amendment, after the history of interstate commerce legislation in this country as above narrated, and the public agitation of the subject for more than a quarter of a century, why should there now be any doubt as to the meaning of this broad and comprehensive language?

(b) *As to the Proviso:* It will not do to say, as the appellant suggests, that because the paragraphs of the statute above quoted are contained in provisos that therefore they are limitations upon the language previously used. This court has had occasion to hold frequently that the language in a proviso often shows the legislative intent to bring in new matter rather than to limit or explain that which has gone before.

> *American Express Co.* v. *U. S.*, 212 U. S., 522-534.
>
> *Georgia Banking Co.* v. *Smith*, 128 U. S., 174.
>
> *I. C. C.* v. *Baird*, 194 U. S., 35, 36, 37.

Each statute, of course, depends upon its own terms and the provisos will be given such construction as is consistent with the legislation under consideration. In the Act of Congress now under consideration one paragraph provided for the exaction of only just and reasonable charges. Another paragraph of the act as amended provided that only money might be received in exchange for transportation. Still another prohibited any departure from published tariff rates.

To relieve the common carriers having these contracts, both from the provisions requiring just and reasonable charges and also from the provision providing only for the exchange of transportation for money, Congress provided:

> "that nothing in this act shall be construed to prevent contracts for exchange of services."

By this proviso, so far as the contracts of carriers with each other are concerned, the provisions of the act for just and reasonable charges, for payment only in money for transportation and prohibiting the "departures from published tariff rates" were abrogated. The carriers were left free to make contracts with each other most consistent with their necessities as they had done prior to the original act in 1886.

(c) *As to the Word "Exchange":* It is contended by appellant that the exchange of services provided for in the act must be an exchange calculated "at regular rates." Here the appellant seeks to inject or interpolate some word or words into the act which are not there to be found. To say that "the exchange of services" provided for in the act must be "at regular rates" is to destroy the privilege of exchange. This follows, because the exchange of services at regular rates is nothing more or less than a sale of service for money. However, the act itself provides not for exchange of services at regular rates, but *for exchange of services,* meaning clearly thereby an exchange of services upon terms upon which each of the parties may agree, taking into account all of the various considerations passing from each of the parties to the other. The word "exchange" has a clearly understood and definite meaning, not only in ordinary conversation, but in legislation and decisions of the courts. It means the giving of *one thing for another.* It excludes the idea of first measuring the respective things in money values and then settling or paying any difference.*

The absurdity of appellant's argument and indeed of the 1916 interpretation of the Commission is made con-

*Authorities in the decision *B. & O.* v. *Western Union Telegraph Co.*, 241 Fed., 162, affirmed 242 Fed., 914, followed by the Circuit Court of Appeals in the Seventh Circuit in the case at bar.

spicuous by its utter lack of consistency. Both the appellant and the Commission concede that common carriers may contract with each other for "on line" service, but it may well be asked where is there anything in the act to indicate that Congress was especially concerned with so-called "on line" service? Indeed, the act itself excludes any possible interpretation of this kind.

(d) *As to Cable Companies:* To emphasize what the act means, the language is:

> "That nothing in this act shall be construed to prevent telephone, telegraph, and *cable* companies from entering into contracts with common carriers, for the exchange of services." (Italics ours.)

The Great Western Railroad Company has its eastern termini in Chicago and its western termini in Kansas City, Omaha, Minneapolis and St. Paul. It may well be asked how the Great Western Railroad Company or any other railroad in the United States could enter into a contract for exchange of "on line" services with a cable company? To propound the inquiry is to propound an absurdity. But—it is clear that cable companies have the right to exchange services with other common carriers and likewise that other common carriers have the right to contract for exchange of services with cable companies.

Again—according to the interpretation of the Commission and the one now urged by the appellant—there can only be an exchange for services rendered between a railroad company and one of the other carriers mentioned in the act when running along a common right of way. The burden is upon the appellant to show to the court how railroad companies and cable companies could occupy a common right of way. Appellant's interpretation would confer on railroad and cable companies the extraordinary valuable privilege of contract-

ing with each other, but at the same time of only being permitted to make contracts for the performance of impossible conditions. It is a cardinal rule of statutory interpretation that every word of the statute be given effect, provided it develops no internal contradiction in the law and does not thwart the obvious intention of the legislature. Authorities upon this point are so numerous that their citation is superfluous.

The interpretation placed upon the statute by the appellant and Interstate Commerce Commission flagrantly violates this cardinal principle of statutory interpretation. It not only injects into the statute words that are not there, but it gives no meaning at all to the word "cable."

(e) *As to the Right to Contract:* Not only does the interpretation urged by the appellant emasculate the word "cable," but it also destroys the meaning of the word "contract." The amendment was not needed to accomplish the result contended for by appellant. Appellant's interpretation of the act is nothing more or less than a bookkeeping transaction.

Under the law, prior to the enactment of the amendment, the appellant could send telegrams for the appellee at its published tariff rates and the appellee could carry merchandise for the appellant at its published tariff rates, and each could pay the other for the bills of the other by check, or the balance could be paid by the debtor corporation. No law has ever prohibited such a transaction. It required no statutory enactment to authorize it. To give to the statute such an interpretation is to say that the statute accomplished nothing at all, and added nothing to the law. Courts do not indulge in such methods of statutory interpretation. The courts will assume that a statutory enactment is made for a purpose.

III.

(f) *As to the relation of the amendment of* 1910 *with respect to free transportation, to the controversy presented by the cases at bar:* The lack of logic of the appellant's position is further illustrated when one considers the second amendment to the Act of 1910, above referred to.

The appellant's position is that the appellant has the right to refuse to carry out its obligations under the contract because it is illegal for the appellant to give free or reduced "off line" services to the officers and agents of the appellee. The inference is that if it were legal to give such service the appellant would not be in court seeking to escape from the obligations of the contract which it made more than a quarter of a century ago. But as a matter of fact, Section (1) of the act confers upon the appellant the privilege to render *free service to any officer, agent or employee of the appellee at any time or place and for any purpose whatsoever.* The appellant is, therefore, placed in this position: There is no question but that under the act, irrespective of the contract, the appellant could perform for *no consideration* all of the services which it undertook by the contract to perform. How, then, can the appellant be heard to say that the contract is illegal, because under the contract it undertook to perform services for nothing which the law says it has the right to give for nothing, or without consideration?

As a matter of fact, however, there is no *free* service under the contract, though it would be lawful if it were given. As has frequently been said, all of the services

and all of the considerations passing from one party to the other is the real consideration for all of the services and all of the considerations passing from the other party to it.

III.

It is suggested in appellant's brief that the appellant gives $8,000 free telegraphic service a year because, as appellant says, the amount of telegraphic service measured in terms of cash rendered by the appellant to the appellee exceeds the amount of transportation furnished by the appellee to the appellant, both measured in terms of tariff rates.

The argument amounts to nothing; *ex nihilo nihil fit.*

The free transportation furnished by the appellee to the appellant may not by the terms of the contract be set off against the so-called free service rendered by the appellant for the appellee. All of the consideration passing under this contract from the appellee to the appellant is the measure of all of the consideration passing under this contract from the appellant to the appellee. No one part of this contract may arbitrarily be selected by the appellant and set off against some arbitrarily selected consideration passing from the appellee to the appellant for the purpose of destroying all or any part of the contract. The contract is an entire contract. The covenants to be performed on one side are interwoven and interdependent with those to be performed on the other.

An examination contained in the opening statement of facts of this brief of the various considerations passing from each party to the other discloses how complicated and interwoven the mutual considerations are. As was

said by the Circuit Court of Appeals of the Seventh Circuit:

> "So intertwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the other."

Counsel will not be heard to contend, as he does on page 49 of his brief, that by sustaining this contract as an entirety the Postal Telegraph Company will bear an operating expense of $7,000 or $8,000 a year for the transmission of telegrams for the railroad company. The statement confutes itself, because as the appellee respectfully submits, to take away from it this consideration passing from the appellant to it is to take away from it one of the valuable considerations which influenced it to enter into the contract. It is in fact to destroy the contract.

IV.

Conclusion.

The appellant, on page 36 of its brief, makes a gratuitous reflection upon the Court of Appeals for the Seventh Circuit by stating that the court merely followed the decision of the Court of Appeals for the Second Circuit. The appellant seeks to avoid the effect (if any) which this court may attach to the decisions of the Circuit Court of Appeals of the Second Circuit and of the Seventh Circuit by reflecting upon the good faith of the proceedings in the former Circuit, and upon the faithful performance of duty by the judges of the court in the latter Circuit. (Appellant's Brief, 33, 34, 35.)

Referring to the case in the Second Circuit the appellant states:

> "No suggestion was made to that court by either

party that this so-called exchange of free service was contrary to public interest."

As the record in that case discloses, the Interstate Commerce Commission appeared in that case and joined with the telegraph company in the hearing. So far as appellant's suggestion is concerned, it is sufficient to say, that the Interstate Commerce Commission had already reported to Congress as follows:

> "Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention. So far as we can now see, *the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.*" (Italics ours.)

So far as the gratuitous reflection upon the Circuit Court of Appeals of the Seventh Circuit is concerned, the record in the Western Union—B. & O. case in this court shows that when a motion was made to advance that case for argument the Postal Company, by its counsel, appeared before the bar of this court and asked to have its argument deferred until the case from the Seventh Circuit could reach the court, upon the ground that the Great Western-Postal case presented important facts not presented by the Western Union record.

In the Circuit Court of Appeals of the Seventh Circuit, the same representation was made by the same counsel for the purpose of expediting the case. This appears from the opinion of that court where the court says (Tr., 108):

> "As the Western Union case is pending in the Supreme Court, we have taken this case now only on the representations of the Postal Company that there are important facts in this record which were not adduced in the Western Union case and that it

would be advantageous to have both records before the Supreme Court at the same time.

We find no additional facts that in our judgment enlarge or change the questions for decision."

Thereupon, that court proceeded to consider and decide the case.

In addition to the reasons of the Circuit Court of Appeals of the Second Circuit for its decision, the Court of Appeals gave six additional grounds for reversing the decision of the District Court in the Seventh Circuit, and following the conclusion of the Court of Appeals of the Second Circuit.

The appellee respectfully submits that such reflections upon the good faith of the courts, unwarranted by any facts in the record, should not be encouraged.

Appellant sounds an alarm that if the contracts herein questioned are held to be legal and the Government should take over the telegraph companies under the provisions of the Post Roads Act, it would also have to assume the burden of all the alleged free service allowed the railroads under the contracts. Again, it is sufficient to say that if the contingency to which counsel refers should occur, the Government will be amply able and prepared to protect its interests.

It is, therefore, submitted that the decree of the Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 130, 217 and 404.—October Term, 1918.

Postal Telegraph-Cable Company, Plaintiff in Error, 130 *vs.* Tonopah and Tide Water Railroad Company.	In Error to the Supreme Court, Appellate Division, First Department of the State of New York.
The Western Union Telegraph Company, Appellant, 217 *vs.* The Baltimore and Ohio Railroad Company.	Appeal from the United States Circuit Court of Appeals for the Second Circuit.
Postal Telegraph-Cable Company, Appellant, 404 *vs.* Chicago Great Western Railroad.	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 20, 1919.]

Mr. Justice Holmes delivered the opinion of the Court.

The first of these cases, *Postal Telegraph-Cable Company* v. *Tonopah and Tide Water Railroad Company*, was a suit in the Municipal Court of the City of New York for services rendered to the Railroad Company. The defendant set up that the services consisted of the sending of telegrams relating to the defendant's business and were covered by a contract such as usually is made between railroads and telegraphs, under which such telegrams were to be sent free of specific charge. The question raised was the validity of the agreement. The Court decided that it was valid and judgment for the defendant was affirmed on appeal. The next case in number, *The Western Union Telegraph Company* v. *The Baltimore and Ohio Railroad Company* was brought by the Railroad Company in the District Court of the United States for the Southern District of New York and sets up a similar contract, which the Telegraph Company now refuses to perform in conse-

quence of a ruling of the Interstate Commerce Commission. It prays a declaration of the validity of the contract and specific performance. The plaintiff obtained a decree in the District Court, 241 Fed. Rep. 162, which was affirmed by the Circuit Court of Appeals, 242 Fed. Rep. 914. The last of the three cases, *Postal Telegraph-Cable Company* v. *Chicago Great Western Railroad*, was another bill in equity, brought by the Railroad Company in the District Court of the United States for the Northern District of Illinois upon a similar contract, to prevent a multiplicity of suits by the Telegraph Company like that first above mentioned, to have the validity of the contract declared, and to obtain a decree that it be performed. The defendant prevailed in the District Court, 249 Fed. Rep. 664, but the decision was reversed by the Circuit Court of Appeals, and there the plaintiff obtained a decree. 249 Fed. Rep. 664. The only question upon which our decision is sought is the validity of the agreements, which are so far alike as to present a single issue here.

The contracts elaborately provide for the reciprocal rights of the companies, for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employees of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. The Commission construes in this way a proviso added to § 1 of the act to regulate commerce by an amendment of June 18, 1910, c. 309, § 7. This amendment brought telegraph, telephone and cable companies within the act but also inserted a proviso "that nothing in this Act shall be construed to

prevent telephone, telegraph, and cable companies from entering into contracts, with common carriers, for the exchange of services.'' The question more specifically stated is whether the construction adopted by the Commission is right.

We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. But 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way. We cannot follow the argument from *Santa Fe, Prescott and Phoenix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, that the exchange properly so called should be confined to cases where the common carrier is not acting as such. That seems to us a perverse conclusion from a proviso permitting 'common carriers' to exchange.

Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other. The railroad and the telegraph have grown together in mutual dependence and we are told that contracts of this sort for long terms have been nearly universal for fifty years. The contracts had been called to the attention of Congress repeatedly by the Commission, which, in December, 1906, stated that, so

far as it could see, the full performance of them by the carriers would not affect any public or private interest adversely. It held however that under the law as it then stood contracts for services off the line were unlawful. 12 I. C. C. 10, 12. Then the Amendment of 1910 was passed, and passed, we must suppose, having the opinion of the Commission and the notorious long-standing form of existing contracts in view. The contracts are complex, as we have said, and entire. We cannot believe that an act which purported to allow them meant to break them up. The Commission seems not to have believed it in its first ruling upon the amended act.

Our opinion is confirmed by a consideration of the further additions to § 1, in 1910, allowing free passes to be given to the employees of telegraph, telephone and cable lines, and by some further matters of detail referred to in the judgments of the Courts below of which we have cited the reports. The interdependence of the companies is very intimate, and the trouble that would be caused by a narrow construction of the act we believe would be great, with no advantage so far as we can see to any other users of the lines or roads. We do not go into more minute discussion because the result reached must stand on the plain words of the act, the meaning of which is confirmed rather than made doubtful by the circumstances in which the proviso was enacted and the events that had gone before.

Judgment and decrees affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 176 and 248.—October Term, 1918.

176	Louisville & Nashville Railroad Company, Appellant, *vs.* Western Union Telegraph Co.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.
248	Same *vs.* Same.	In Error to the Supreme Court of the State of Mississippi.

[June 9, 1919.]

Mr. Justice Holmes delivered the opinion of the Court.

These suits, the earlier begun in the District Court of the United States, the later in a court of the State of Mississippi, are bills in equity containing the same allegations and seeking the same relief. They both seek a decree that State judgments of condemnation by eminent domain, giving to the telegraph company the right to erect its poles along the railroad's right of way across the State of Mississippi, are void. The State case was decided first and was in favor of the defendant in error. 107 Miss. 626. Then in the District Court the telegraph company pleaded the State decree as a conclusive adjudication and moved that the bill and a supplemental bill be dismissed. Against the supplemental bill it also set up an injunction in its favor granted by another Court of the United States, reported in 201 Fed. Rep. 946 and 207 Fed. Rep. 1. The bills were dismissed upon both grounds. 233 Fed. Rep. 82. 147 C. C. A. 152. The constitutional questions raised are presented equally in the State case and as we shall deal with them under that, 107 Miss. 626, it may be assumed, subject to those questions, that the other decision was right, as we see no reason to doubt.

The Mississippi proceedings in eminent domain are limited in their effect to determining the amount of damages to be paid. If the right to condemn is disputed that is left to be decided by a suit in equity. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown*

R. R. Co., 89 Miss. 84, 105-107, 110, 113. The railroad company resorted to such a bill in this case. So far as it alleged a failure to comply with the State laws the State decision is conclusive against it, and of course it cannot complain of not being given a hearing simply because it is referred for that hearing to a different suit from that in which the value of the property is fixed. The separation is familiar. *United States* v. *Jones*, 109 U. S. 513, 519. Passing these matters by, the first contravention of the Fourteenth Amendment alleged is that under the Mississippi laws the right could be taken only for a new line, whereas the bill avers that the Telegraph Company wanted the right not for a new line but for the purpose of maintaining an existing line that it had maintained theretofore under a contract with the railroad now brought to an end. To this the Supreme Court replied that, the judgments being right upon their face, if the telegraph company attempted to use them to maintain an existing line instead of a new one its rights could be determined when the attempt was made. The Fourteenth Amendment knows no difference between the two purposes, and the extent to which the telegraph company is confined to one of them under the State laws is for the State court to decide. No constitutional right is infringed when the State court postpones discussion until the attempt is made. The decree as well as the opinion saves the railroad's right in that event.

It is argued that the judgments are void because they do not fix the exact location of the telegraph poles within the specified right of way. But they allow only one line of poles to be set up, and require it to be erected "in such manner and at such distance from defendant's (the railroad's) track as in no way to interfere with the operation of trains of said defendants, or with any proper and legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained." The petition contains an agreement that if, after the erection of the poles, &c. "it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use or occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice

from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant." This agreement is binding. *Mobile & Ohio R. R. Co.* v. *Postal Telegraph Cable Co.*, 76 Miss. 731, 752, 753. The description has been held to satisfy the requirements of State law and it would be extravagant to say that the Fourteenth Amendment made it bad.

It is contended that the State had no power to condemn for the use of the telegraph company any part of the right of way of an interstate road or bridge over navigable waters. Support for the argument is sought in *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540. That case shows, to be sure, that the Act of July 24, 1866, c. 230, 14 Stat. 221, R. S. § 5263, purporting to grant to any telegraph company the right to construct and maintain lines along the post roads of the United States and to cross navigable streams, did not of itself give the right to appropriate private property. But it equally shows that Congress gave its assent to the acquisition of such rights in post roads by any means otherwise proper, as against any objection that it was an interference with interstate commerce, and such is the implication of the cases. 'State sovereignty under the Constitution is not interfered with.' *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12. *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 169. *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 207 Fed. Rep. 1, 11, 12. The present decision is enough to establish that the condemnation followed the State law. See also *Cumberland Telephone & Telegraph Co.* v. *Yazoo & Mississippi Valley R. R. Co.*, 90 Miss. 686. No act of Congress prevents the State proceedings having their intended effect.

We think it unnecessary to deal with the somewhat meticulous objections to the form in which the Mississippi decree was pleaded and proved in the District Court or to repeat the answer of the defendant in error to the contention that if proved it was not an adjudication. If the bill in the District Court had not been disposed of by the State decree it would be dismissed under our present decision. Two days before the answer setting up the State decree the railroad filed a supplemental bill alleging that the telegraph company had no longer any rights except under the condemnation proceedings but that it still was using its old line. The telegraph

company pleaded in reply an injunction, mentioned above, granted by another Court of the United States, forbidding the railroad to interrupt the telegraph in the use of its wires upon the railroad's right of way, the declared purpose being to preserve the *status quo* for a certain time, or until the condemnation could be carried out. 207 Fed. Rep. 1, 5. If for any reason the supplemental bill does not fall with the bill this earlier action in the Sixth Circuit (while it stands, see 252 Fed. Rep. 29,) properly was regarded as precluding contrary action in the Fifth.

Decrees affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.